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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

Nos. 57-59.

THE ASSOCIATED PRESS, *et al.*,
Appellants,

v.

THE UNITED STATES OF AMERICA,
Appellee.

THE UNITED STATES OF AMERICA,
Appellant,

v.

THE ASSOCIATED PRESS, *et al.*,
Appellees.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE ASSOCIATED PRESS.

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October 23, 1944.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

TABLE OF HEADINGS.

	PAGE
INTRODUCTION	1
THE DECISION BELOW	3
JURISDICTION	3
QUESTION PRESENTED	3
STATEMENT	11
The Background of the Case	11
The Associated Press—a Natural and Normal Development	11
Assessments	14
Quality of Service	15
Competitors of AP	17
United Press	18
International News Service	19
The New York Times Syndicate	20
Chicago Tribune-New York News Syndicate	21
New York Herald-Tribune Syndicate	22
Other Services	22
AP Membership Not Necessary to Start or Continue a Newspaper	23
Summary as to Effect of AP	32
The *Ratio Decidendi* of the Majority—The Novel Doctrine of "Full Illumination"	33
Based on Controverted Assumptions	34
Multiplicity of Sources of Illumination	37
The "Personal Impress"	38
The Judgment Tends to Diminish—Not Increase—Illumination	40
Conflict with Other Public Policies	41

PAGE

The By-Laws of The Associated Press 42

Admission to Membership 42

Bondholders' Vote 45

Initial Payments 47

Admission by Purchase of Other Papers 50

Waiver of Exclusive Rights With Respect to Other Agencies 50

By-Laws Against Disclosure of the News Reports 51

Opinion of the Attorney General Approving AP 52

Origin of the Present Suit 53

Proceedings in the Present Case 56

The Judgment 56

ASSIGNMENTS OF ERROR 57

ARGUMENT 57

I. *A News-Gathering Organization — Formed Solely for the Purpose of Greater Efficiency, and Which Is Expressly Found not to Monopolize or Dominate—Is Under No Obligation to Admit Into Membership and Share Its News "Copy" on Equal Terms With Other Papers* 58

Effect of the Ruling Below 60

A Discriminatory Principle—in Conflict With Prior Cases 63

Error of Court below as to "Public Policy" and "Full Illumination" 75

Cases Cited by the Government 76

1. Monopoly Cases 76

2. Coercion Cases 77

3. Price-Fixing Cases 78

PAGE

II. *News-Gathering Organizations Are Not Public Utilities and Should Not Be Made Such by* Judicial Action 79

Not justified by Sherman Act 81

Newspapers not public utilities 82

News agencies not public utilities 83

The courts ill-equipped to supervise 87

Failure of Congress to act 90

III. *The Supplementary Arrangements to Prevent the Disclosure of the News to Others Before Publication Are Reasonable and Lawful Per Se and Should Not Be Prohibited as a Means of Compelling AP to Serve as a Public Utility* 91

The by-law agreement 91

The Canadian Press agreement 97

IV. *The Decision Below Is in Conflict With the Public Policy Embodied in the First Amendment* 100

Effect of the judgment below 103

No clear necessity—No clear and present danger 105

The public policy of the First Amendment 107

CONCLUSION 109

APPENDIX 111

Statutes Involved 111

Table of Cases.

	PAGE
American Column & Lumber Co. v. United States, 257 U. S. 377	78
American Live-Stock Com. Co. v. Chicago Live-Stock Exchange, 143 Ill. 210; 32 N. E. 274	73
American Medical Association v. United States, 317 U. S. 519	78
Anderson v. Shipowners Association, 272 U. S. 359	77
Appalachian Coals, Inc. v. United States, 288 U. S. 344	70
Associated Press v. Emmett, 45 F. Supp. 967	85
Associated Press v. Sioux Falls Broadcast, CCH Trade Regulation Service, Decisions Supp. 1932-1937, par. 7052 (S. D. So. Dakota, 1933)	85
Associated Press v. Washington News Publish. Co. (Equity Doc. No. 15,539, Sup. Ct. D. C. 1894)	85
Atchison T. & S. F. R. Co. v. Denver & New Orleans R. Co., 110 U. S. 667	80
Binderup v. Pathé Exchange, 263 U. S. 291	77
Board of Trade v. Christie Grain and Stock Co., 198 U. S. 236	69, 83, 91
Bridges v. California, 314 U. S. 252	105, 109
Chapman v. American Legion, 14 So. (2d) 225	74
Chicago Board of Trade v. Olsen, 262 U. S. 1	73
Cline v. Insurance Exchange of Houston, 166 S. W. (2d) 677	74
Commonwealth v. Boston Transcript Co., 249 Mass. 477, 144 N. E. 400	83
Dunlap's Cable News Co. v. Stone, 60 Hun 583; 15 N. Y. S. 2	84
Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U. S. 600	77
Ethyl Gasoline Corp. v. United States, 309 U. S. 436	77
Express Cases, 117 U. S. 1	80
Fashion Originators' Guild v. Federal Trade Commission, 312 U. S. 457	78

PAGE

Federal Trade Commission v. *Curtis Publishing Company*, 260 U. S. 568 72
Fisher v. *News-Journal Co.*, 21 A. (2d) 685 82
Friedenberg v. *Times Pub. Co.*, 170 La. 3, 127 So. 345 83

Garrigues Co. v. *New York Produce Exchange*, 213 App. Div. 625 73
Greer, Mills & Co. v. *Stoller*, 77 Fed. 1 71
Grosjean v. *American Press Co.*, 297 U. S. 233 ..... 100, 107, 108

Hunt v. *New York Cotton Exchange*, 205 U. S. 322 91
Hurlbutt Hatch & Co., In re, 135 Fed. 504 74

International News Service v. *Associated Press*, 248 U. S. 215 ..... 58, 64, 85, 87, 92
Inter-Ocean Publishing Co. v. *Associated Press*, 184 Ill. 438; 56 N. E. 822 ..... 86, 87
Interstate Circuit, Inc. v. *United States*, 306 U. S. 208 78

Journal of Commerce Publishing Co. v. *Tribune Co.*, 286 Fed. 111 ..... 82, 86

Ketcham v. *Provost*, 156 App. Div. 477; affd. 215 N. Y. 631 74

Lake County v. *Lake County Publishing & Printing Co.*, 280 Ill. 243; 117 N. E. 452 83
Lepler v. *Palmer*, 150 Misc. 546; 270 N. Y. S. 440 82
Loewe v. *Lawlor*, 208 U. S. 274 ..... 77, 78

Lovell v. *Griffin*, 303 U. S. 444 108

Mack v. *Costello*, 32 S. Dak. 511; 143 N. W. 950 83
Martin v. *Struthers*, 319 U. S. 141 108
Matthews v. *Associated Press of New York*, 136 N. Y. 333 ..... 79, 84, 86, 87
Mid-West Theatres Co. v. *Co-Operative Theatres*, 43 F. Supp. 216 71
Michigan Public Utilities Commission v. *Duke*, 266 U. S. 570 80
Minersville School District v. *Gobitis*, 310 U. S. 586 103

PAGE

Montague v. *Lowry*, 193 U. S. 38 77
Moore v. *New York Cotton Exchange*, 296 Fed. 61; 270 U. S. 593 ..... 70, 83
Murdock v. *Pennsylvania*, 319 U. S. 105 7

National Biscuit Company v. *Federal Trade Commission*, 299 Fed. 733 72
Near v. *Minnesota*, 283 U. S. 697 108
Nebbia v. *New York*, 291 U. S. 502 ..... 9, 80
News Publishing Company v. *The Associated Press*, 190 Ill. App. 77 87
New York & C. Grain & Stock Exchange v. *Board of Trade*, 127 Ill. 153; 19 N. E. 855 73

Olmstead v. *United States*, 277 U. S. 438, 469 107
Olsen v. *Nebraska*, 313 U. S. 236 80

Paramount Famous Lasky Corp. v. *United States*, 282 U. S. 30 77
People ex rel. Dodson v. *Board of Trade of Chicago*, 224 Ill. 370; 79 N. E. 611 73
People v. *Forest Home Cemetery Co.*, 258 Ill. 36; 101 N. E. 219 86
People v. *Holstein-Friesian Association*, 41 Hun 439 74
Philadelphia Record Co. v. *Curtis-Martin Newspapers*, 304 Pa. 372; 157 Atl. 796 83
Prairie Farmer Publishing Co. v. *The Indiana Farmer's Guide Pub. Co.*, 88 F. (2d) 979 71
Producers Transportation Co. v. *R. R. Comm.*, 251 U. S. 228 80

Rerda v. *The Tribune Company*, 218 Ill. App. 45 82

Schneider v. *State*, 308 U. S. 147 108
Sharon Herald Co. v. *Mercer County*, 200 Atl. 880 82
Shuck v. *Carroll Daily Herald*, 215 Iowa 1276; 247 N. W. 813 83
Smith v. *Cahoon*, 283 U. S. 553 80
Standard Sanitary Mfg. Co. v. *United States*, 226 U. S. 20 77
State ex rel. The Star Publishing Co. v. *The Associated Press*, 159 Mo. 410 ..... 84, 86

PAGE

State of North Dakota v. *North Central Association*, 23 F. Supp. 694; affd. 99 F. (2d) 697 74
Sugar Institute, Inc. v. *United States*, 297 U. S. 553 78
Sun Publishing Co. v. *Walling*, 140 F. (2d) 445 ..... 7, 108

Terminal Taxicab Co. v. *District of Columbia*, 241 U. S. 252 80
Thomsen v. *Cayser*, 243 U. S. 66 77
Thornhill v. *Alabama*, 310 U. S. 88 ..... 102, 108

Uhlman v. *Sherman*, 22 Ohio N. P. (NS) [illegible]5 83
United States v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 ..... 63, 68
United States v. *American Linseed Oil Co.*, 262 U. S. 371 78
United States v. *American Tobacco Co.*, 221 U. S. 106 ..... 63, 68
United States v. *The Associated Press*, 52 F. Supp. 362 3
United States v. *Bausch & Lomb Co.*, 321 U. S. 707 ..... 66, 69
United States v. *Colgate & Co.*, 250 U. S. 300 ..... 66, 69, 82
United States v. *Cooper*, 312 U. S. 600 82
United States v. *First National Pictures, Inc.*, 282 U. S. 44 78
United States v. *International Harvester Co.*, 274 U. S. 693 73
United States v. *New York Coffee and Sugar Exchange*, 263 U. S. 611 69
United States v. *Terminal Association of St. Louis*, 224 U. S. 383 ..... 10, 65, 67, 69, 77
United States v. *United States Steel Corp.*, 251 U. S. 417 73

Weidenfeld, Matter of, v. *Keppler*, 176 N. Y. 562 74
West Virginia Board of Education v. *Barnette*, 319 U. S. 624 ..... 102, 105, 108
Wilson v. *Commercial Telegram Co.*, 3 N. Y. Supp. 633 84
Wohl, In re Louis, 56 F. (2d) 254 ..... 83, 86
Wooster v. *Mahaska County*, 122 Iowa 300; 98 N. W. 103 83

Statutes.

	PAGE
Clayton Act	2, 112
Constitution—First Amendment	6, 7, 42, 58, 75, 100, 105, 107, 108, 109
Expediting Act §1	2
Expediting Act §2	3
Judicial Code §238	3
Sherman Act §1 and 2	1, 6, 69, 70, 72, 81, 111

Other Citations.

Associated Press By-Laws, Art. II	50
Associated Press By-Laws, Art. III	43, 44, 48, 49, 50
Associated Press By-Laws, Art. VII	46, 91
Associated Press By-Laws, Art. VIII	91
2 Cooley Constitutional Limitations 8th Ed., p. 885	108
Federal Rules of Civil Procedure—Rule 56	2, 56
H. R. 1691, 63rd Cong., 1st Sess., 1913	90
H. Report 175, 47th Cong., 1st Sess., 1882	90
LaPrensa Editorial Feb. 22, 1944, reprinted in The New York Times Feb. 23, 1944	103
Milton, Areopagitica—A Speech for the Liberty of Unlicensed Printing, 1644	101
Opinion Attorney-General Gregory, March 12, 1915	52; 75, 86
Special Committee of Associated Press Members in Smaller Communities	47
Ullstein, The Rise and Fall of the House of	103

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Appeals from the District Court of the United States for the Southern District of New York.

BRIEF FOR THE ASSOCIATED PRESS, *ET AL.*

Introduction.

This is a suit in equity under the anti-trust laws, filed by the United States in the United States District Court for the Southern District of New York against The Associated Press, its directors, and certain representative member newspapers.

The complaint charges violation of Sections 1 and 2 of the Sherman Act* with respect to interstate commerce in

* For the pertinent text of the Sherman Act, see Appendix, *infra*.

news—and asks for equitable relief. The principal charge relates to the AP by-laws on admissions—because they reserved the right to accept or reject applicants for membership, as hereinafter set forth. There are also secondary charges with respect to other by-laws and agreements —which were designed to protect the AP news reports from disclosure to non-members before publication. A charge with respect to an alleged violation of the Clayton Act, by the acquisition of stock in a company supplying news pictures, is also made—but this charge was dismissed on the merits by the court below. The Government did not appeal from that dismissal, and the alleged Clayton Act violation is not in issue here.

The case was brought before a statutory three-judge court in accordance with Section 1 of the Expediting Act of 1903 (R. 156). Answers were filed (R. 115, 131). Interrogatories and requests for admissions were served and answered (R. 158; 308; 347; 393; 413; 421; 433; 487; 490; 552; 773; 801; 886). Examinations before trial were held and affidavits were submitted (R. 1977-2578; 1415-1976).

The plaintiff then moved for summary judgment without trial under Rule 56 of the Federal Rules of Civil Procedure (R. 955). That rule permits summary judgment only where

> "* * * there is no genuine issue as to any material fact."

Thus the Government waived any right to rely upon controversial issues, and elected to rest its case solely upon such facts as appear, on the record in this case, to be beyond any genuine controversy.

The court accepted and decided the case upon this motion—an unusual, if not unprecedented, procedure in an anti-trust suit of such importance and complexity.

The Decision Below.

The court below—by a 2 to 1 decision—granted the plaintiff's motion.

One judge, voting to deny the motion, dissented.

For the opinions see 52 F. Supp. 362, R. 2579; 2601. For the judgment entered upon the opinion see R. 2630.

Jurisdiction.

Appeals were taken by defendants to this Court.

A cross-appeal was then taken by the Government.

The jurisdiction of this Court was invoked under Section 2 of the Expediting Act of 1903 and under Section 238 of the Judicial Code.

This Court has noted probable jurisdiction (R. 2681).

Question Presented.

This case presents the question whether a news-gathering organization—formed solely for purposes of greater efficiency—and which is expressly found not to monopolize or to dominate the distribution of news—which is not even found to be better than other competing agencies—and which is in no wise indispensable to the successful operation of a newspaper—must admit into membership and share its news "copy", before publication, with other competing papers, on equal terms.

If so, The Associated Press would become in effect a public utility and subject to regulation as such. That is what is involved in this case.

The majority of the court below arrived at this public-utility result by the intermediate step of finding, not in terms but in effect, that a successful news agency is bound

to admit all applicants on equal terms—and violates the anti-trust laws if it does not do so. (See *infra*, pp. 59-60.)

But the only thing that constituted a violation of the anti-trust laws was—embarking successfully in the news agency business without giving competitors access to its news dispatches before the members publish them themselves.

The majority reached this result notwithstanding that it expressly held that

—The Associated Press had not monopolized the original sources of the news (R. 2629)—anyone may gather the news with entire freedom.

—It had not monopolized the business of collecting and distributing the news (R. 2629).

—It had not monopolized any of the means of transmitting the news (R. 2629).

—Numerous other successful news agencies exist (R. 2584).

—It had never held itself out to serve all comers (R. 2607).

—Membership in The Associated Press is not necessary (R. 2593)—hundreds of papers, including some of the largest and most successful, have been founded and are flourishing without such membership.

The court did not even find that The Associated Press services were the best of all existing services (R. 2594). Indeed it expressly held that no such finding could be made upon this motion (R. 2585).

Contention of Majority.

The majority relied solely upon a finding that news—unlike other commodities—is subject to a peculiar "public

policy." This "public policy" is said to require the dissemination of news

> "from as many different sources, and with as many different facets and colors as is possible"

—in order to secure "full illumination" of the public (R. 2594-6).

This "full illumination" cannot be attained—according to the majority of the court below—except by giving every newspaper immediate and simultaneous access—if not to every agency, then to every agency which is really important.

In the language of the court below——

> "to deprive a paper of the benefit of any service of the first rating is to deprive the reading public of means of information which it should have" (R. 2595).

Thus the proprietary rights of the defendants are confiscated for the supposed benefit of the public.

The court did not find—and indeed it could not have found on this record—that any publisher, or the public generally, has been deprived of the essential facts themselves—the straight news. It did not find—and it could not have found—that the public in any serious degree lacks a multiplicity of analysts and commentators to enable it to understand the news. It did not find that the AP dispatches were to be kept secret. The only wrong was that the defendants wanted to publish them themselves.

Its conclusion was based upon the theory—not that one news agency has information as to important facts not possessed by others—but that different news agencies possess a certain individuality—"a personal impress"—in the manner of presentation (Op., R. 2395).

Thus, in effect, every really successful news agency which can write good copy is under obligation to share that copy, before publication, with anyone who wants to publish it.

This is an extraordinary doctrine to apply to property of the mind.

Contention of Defendants.

The defendants deny the existence of any injury to the public which requires them to share their copy with their competitors—or which, in the language of the court, "compel[s] them to make their dispatches accessible to others." (Op., R. 2600).

Any such finding would certainly present very complex issues of fact. Those issues are earnestly and genuinely controverted by the defendants and cannot properly be assumed upon a motion for summary judgment.

Moreover, the defendants contend that the public policy of the United States as laid down by the First Amendment to the Constitution requires that the press should be more free—in any event certainly not less free—than other forms of business. It is indeed a novel construction of the law that the members of the press—simply because they are the press—should be required to share the fruits of their own enterprise with others.

The record in this case discloses no higher public interest than the public interest in a free press. To compel the defendants to share their copy with all applicants and to subject them to detailed administrative regulation—upon a discriminatory theory applicable only to the press—is not only without justification under the Sherman Act—but also violates the letter and the policy of the First Amendment.

We do not deny that the press is subject to those general principles of law which are applied without discrimina-

tion to all industries.* But we do contend that the public policy reflected in the First Amendment is to leave the press as free as possible—and to avoid, so far as is humanly possible, subjecting the press to complex and permanent judicial and administrative controls.

The dissenting opinion of Judge Swan in the court below is so clear upon all these issues that we believe that it will aid this Court to set forth the substance of his reasoning.

Judge Swan first answered any contention that The Associated Press had violated the anti-trust laws merely because it is a "combination" or because of its size and efficiency—saying (R. 2602):

> "But to violate the anti-trust law the combination, whatever its size, must tend to monopolize or to restrain unreasonably interstate trade. Clearly the provisions of A.P.'s by-laws as to admission of members have had no tendency to create a monopoly in news gathering—witness the growth of U.P., I.N.S., and other news gathering agencies. Nor is there proof that they have stifled competition between member newspapers and other newspaper owners or prospective publishers. Not a single instance has been adduced where a newspaper failed because it lacked an A.P. membership or was not started because the intending publisher could not obtain one. On the contrary, numerous papers have attained great success without such membership."

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* This broad principle may be subject to some qualification. Thus in *Sun Publishing Co.* v. *Walling*, 140 F. (2d) 445, 450, it was held that a court could not forbid the further publication of a newspaper as a penalty for violating the National Labor Relations Act, though it might have forbidden the further conduct of a business not protected by the First Amendment.

And in *Murdock* v. *Pennsylvania*, 319 U. S. 105, this Court held that even a non-discriminatory tax might violate the First Amendment, saying (p. 115) "The fact that the ordinance is 'non-discriminatory' is immaterial. * * * Freedom of the press, freedom of speech, freedom of religion *are in a preferred position.*" (Italics ours.)

Then—going straight to the heart of the matter—he pointed out that the real reason for the majority decision was their view that The Associated Press is engaged in a "public calling"—saying (R. 2602-3):

> "What, then, is the ground for holding that the by-law provisions have resulted in an unreasonable restraint of trade either in news gathering or in newspaper publishing? Solely the court's view that a news gathering organization as large and efficient as A.P. is engaged in a public calling, and so under a duty to admit 'all "qualified" applicants on equal terms'.
>
> "The only authority advanced by the plaintiff in support of the proposition that news gathering is a public calling is a discredited decision in *Inter-Ocean Pub. Co.* v. *Associated Press*, 184 Ill. 438, 56 N. E. 822. This litigation involved not the present A. P., but an earlier Illinois corporation whose charter granted it a power of eminent domain. The decision is contrary to *Matthews* v. *Associated Press of New York*, 136 N. Y. 333, 32 N. E. 981, as was recognized in *News Publishing Co.* v. *Associated Press*, 190 Ill. App. 77. It was explained in a later opinion by the Supreme Court of Illinois, *People* v. *Forest Home Cemetery Co.*, 258 Ill. 36, 41, 101 N. E. 219, as resting upon the existence of the power of eminent domain. The Supreme Court of Missouri repudiated the doctrine of the *Inter-Ocean* case in *State ex rel. Star Publishing Co.* v. *Associated Press*, 159 Mo. 410, 60 S. W. 91.
>
> "The business of gathering news is not one of those occupations which were recognized at common law as affected with a public interest. A. P. has never held itself out as ready to serve all newspapers. Nor has it been granted the power of eminent domain or any other public franchise which might justify imposing the duty to serve all applicants without discrimination. If such a duty is to be imposed on

news-gathering agencies, I think it should be by legislative, rather than judicial, fiat."

Emphasizing further the point that the imposition of public-utility obligations on general grounds of public policy is a legislative and not a judicial function, Judge Swan said (R. 2603):

> "Again, in *Express Cases*, 117 U. S. 1, which held that the railroads need not in the absence of a statute furnish to all independent express companies equal facilities for doing an express business upon passenger trains, it was said (p. 29): 'The regulation of matters of this kind is legislative in its character, not judicial.' The same thought was expressed by Mr. Justice Brandeis with respect to the very subject of news gathering in his dissenting opinion in *International News Service* v. *Associated Press*, 248 U. S. 215, at 267:
>
> > "'Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations.'"

Judge Swan distinguished the *Nebbia* case, cited by the majority, as follows (R. 2604):

> "And I find nothing in *Nebbia* v. *New York*, 291 U. S. 502, to contradict this view. There the New York legislature had acted; it had set up elaborate administrative machinery to regulate the milk industry. * * * In sustaining the legislation, Mr. Justice Roberts remarked * * *: 'The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it.'

"In the case of a business which was not recognized as a public calling at common law, I believe it is sound policy to leave to the legislature to determine whether the public welfare requires that all applicants be served without discrimination."

With reference to the *St. Louis Terminal* case—which had been cited as a justification for imposing a public-utility status—Judge Swan said (R. 2605):

"Finally, the Anti-Trust Acts are not, in my opinion, a justification for imposing on A. P. the duty to serve without discrimination all new paper applicants. The case principally relied upon by the plaintiff to show that the Sherman Act may be used to secure indiscriminate service to all comers is *United States* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383. In that opinion Mr. Justice Lurton pointed out that in ordinary circumstances a number of independent companies might lawfully combine for the purpose of acquiring terminals for their common, but exclusive, use, but by reason of the peculiar topographical situation the terminals acquired by the Association gave it control of every feasible means of railroad access to St. Louis; and the decision was based in large measure upon that fact (p. 405). Although the Government urged that the Association be dissolved, the court directed, on account of the obvious advantages of a unification of terminal facilities, that the defendants submit a plan of reorganization which should make the Association the bona fide agent and servant of every railroad line desiring to use its facilities. *I do not regard the case as apposite to the situation at bar. As already pointed out, the Terminal Association had obtained a complete monopoly. But A. P. has no monopoly in news gathering.*"*

* Italics ours herein, unless otherwise noted.

And finally, with respect to the contention that a special public policy justifies a novel and discriminatory treatment of the press, Judge Swan said (R. 2605):

> "The majority opinion intimates that in the case of ordinary goods it might not suffice, but holds that it does in the case of news reports. To my mind the nature of a news report, which is the intellectual product of him who makes it, points to the conclusion that he may choose to whom he will disclose it, rather than to the conclusion that he is under a duty to disclose it to all applicants."

Statement.

The Background of the Case.

The Associated Press—a Natural and Normal Development.

The Associated Press (hereinafter sometimes referred to as AP) is a non-profit, cooperative association of newspaper owners incorporated in 1900 under the Membership Corporations Law of the State of New York (F. 1, R. 2606). It is engaged in the collection and distribution of news reports, news pictures, and features for the benefit of its members (F. 2, 13; 21-23; R. 2606, 2607; 2609). Its news reports are conceded to be accurate, non-partisan and comprehensive (Complaint, par. 66, R. 17; F. 26, R. 2609).

News-gathering agencies—cooperative and otherwise—are not a new development. They have operated in the United States for more than 100 years, and The Associated Press is only one of many such agencies. They are a normal and natural development in the newspaper field. They originate in the fact that individual publishers find it desirable to be able to acquire, by some means, news originating in other communities not covered by their own reporting organization.

A very large number of organizations—varying widely in scope and coverage—have existed from time to time to supply this need. They perform a useful function. The propriety of these organizations, as such, has never been questioned and this we understand is conceded by the Government in the present case.

The defendant The Associated Press is neither the first nor the last of such agencies. It was organized in the year 1900. Its largest competitors—the United Press (hereinafter referred to as UP) and the International News Service (hereinafter referred to as INS)—were organized subsequently—in 1907 and in 1909, respectively (F. 39, 56; R. 2611, 2614).

Most of the 20 to 30 other news services of substantial character (Op. R. 2586; F. 36, R. 2610-11)—such as the New York Times Syndicate, The Chicago Tribune, New York News Syndicate, and The New York Herald-Tribune Syndicate—have also been organized and have risen to their present state since the organization of The Associated Press.

News agencies in general have existed for over 100 years, and The Associated Press and its principal competitors have existed between 30 and 40 years with the knowledge and acquiescence of the Government and of the general public. If the existence of such agencies had resulted in any demonstrable public injury—or in any tendency to such injury—such injury would have had more than ample time to manifest itself.

No such injury has been demonstrated under the facts of this case (*supra*, pp. 3-4). If any such injury had existed, it would not have been necessary to rely—as did the majority of the court below—upon any purely *a priori* and theoretical conception of "public policy", accompanied by

no perceptible and demonstrable injury to the public whatsoever.

The purpose of The Associated Press (R. 1425) was and is to supply to its members unbiased, accurate and comprehensive news.

It never held itself out to serve all comers, and on the other hand it has no intention of injuring non-members.

There are no charges and there is no evidence that The Associated Press is engaged in any predatory practices against outsiders—either against other agencies or against non-member newspapers.

Members of The Associated Press may also subscribe for the services of other agencies, and a considerable proportion of them do so—particularly papers which have sufficient circulation to justify the additional expense.

The Associated Press did not at first operate a self-sufficient news service. During its earlier years, it tended to rely upon its members for domestic news and upon foreign news services for foreign news (Op., R. 2580). It still receives news from these sources.

Gradually, however, AP became very largely self-sufficient. It altered its policy and set up its own news-gathering organization throughout the United States and also in foreign countries—as its competitors UP, INS, and other agencies have done. In so doing it was greatly facilitated by the development of the general use of the telephone and telegraph—which "revolutionized" the business of news-gathering (R. 2005-6; 2032-3; 2471; *infra*, p. 35). At present it has 111 news bureaus within and without the country, with reporting staffs and part-time or "string" correspondents* (F. 15, 17, R. 2607; 2608). In 1942 its

* "String" men are reporters who are not full time employees, but receive compensation in accordance with the amount of material sent in and accepted (R. 662).

total staff included 2007 full-time employees and 3,454 "string" men (F. 19, R. 2608). The result has been that its dependence on its members and the importance of the news obtained by it from members and from other services has much diminished (Op. R. 2580; 2217; 2220).

The news received by The Associated Press from all sources is relayed by public telephone, telegraph, cable or wireless to news assembly points. There it is broken down, classified and edited. It is then distributed over trunk telegraph wires and subsidiary wire circuits to Association members (F. 18, R. 2608).

Other agencies have similar wire distribution facilities, and The Associated Press has no advantage over other agencies in respect of transmitting facilities—either with regard to news reports, news pictures or features (F. 43, 59, 60; R. 2612, 2614; Conclusion XI, R. 2629).

The news so prepared by The Associated Press is furnished to its members in varying degrees in accordance with their needs and wishes. Thus the larger papers may take the entire service, but a more condensed so-called "pony" service is supplied to smaller papers which have no need for the full report.

Assessments.

The total operating expenses of The Associated Press for all services in 1942 amounted to $11,305,577.84 (F. 19, R. 2608). These expenses are met by assessments against the 1234 regular members and 13 associate members (F. 4, R. 2606). The assessments are determined upon the general principle of distributing the cost of service in proportion to the population of the communities served by the various members. Within a given city the total allotment is divided among the members in the same "field" in proportion to their number. Thus a single member in a given

"field" (morning, Sunday or evening) pays the whole assessment allocable to that "field" in that city. Two or more members in the same "field" would share that assessment in approximately equal proportions (F. 14, R. 2607). Consequently The Associated Press does not benefit financially from having more than one member in the same "field" of a city.

The larger metropolitan papers, though constituting a small minority in number, bear the principal burden of the cost. Approximately 800 members of AP in the smaller communities pay in the aggregate roughly $2,000,000 per year—out of the total cost of over $11,000,000. Thus these smaller members contribute on the average only about $50 per week to the expenses of the Association (R. 1458).

One of the fears of the small members has been that some event—such as the instant suit—might make the Association less attractive to the large metropolitan papers. In that event the larger papers might leave The Associated Press and thereby cause the smaller members to bear a greater proportion of its cost. This would be an impossible burden for the smaller members if AP were to try to continue its present comprehensive world-wide service.

Quality of Service.

Both the Government and the court below concede that the service of The Associated Press is excellent. The Complaint admitted and the court specifically found that its news reports "embody the highest standards of accurate, non-partisan and comprehensive news reporting" (F. 26, R. 2609; Complaint, Par. 66, R. 17-18).

Freedom from bias is guaranteed by the fact that

—Members of AP constitute a cross-section of the newspapers of the entire country—reflecting every

possible shade of economic, political, and religious interest and opinion.

—No one member or group of members is allowed to control the news report—and

—Any member violating the by-laws through distortion of the news or otherwise can be suspended or even expelled from AP.

Naturally, the men who direct the affairs of The Associated Press take pride in the high professional standards it has maintained.

Other agencies claim, however, that their news reports and other services are equally good—or even better in quality. The court below specifically refused to find that AP's service was better than that of competitors. The court said (Op., R. 2593-4, 2585, 2586-7) that opinion in the calling sharply differs upon this subject. Many newspapers prefer news reports other than those of The Associated Press (R. 1908-30; F. 73, R. 2616; see also *infra*, pp. 19, 25-32).

The fact is that the standards of the leading agencies are all very high, and the standards of The Associated Press have undoubtedly been a very important factor in making them so. These standards have evolved over a long period out of the self-disciplinary action of a large group of newspapers voluntarily cooperating with one another. From this standpoint it would be a very serious public loss if AP should lose the power of discipline over its members, and thereby endanger the maintenance of these standards.

The Government concedes that the character of the organization of AP

> "is an invaluable guarantee that the promise and claim made by each news-agency—that it presents the news without any political or sectional bias—will in fact be fulfilled" (Complaint, Par. 66, R. 18).

Competitors of AP.

The court below specifically held that AP does not monopolize or dominate

—the furnishing of news

—access to the original sources of news

—transmission facilities for the gathering or distribution of news (C. IX, X, XI; R. 2629).

While AP is larger than any of its competitors,* there can be no possible doubt on this record that powerful, active, effective and steadily increasing competition exists. At least two of the agencies—namely, UP and INS—were specifically found to be individually comparable in size and efficiency with AP (Op., R. 2584, F. 36, R. 2610-11), and the business of all its competitors in the aggregate far exceeds the business of The Associated Press.

The record is barren of a single instance in which The Associated Press membership policy has prevented the start—or blocked the operation—or caused the discontinuance of a single news-gathering service—or newspaper.

On the contrary—insofar as it has had any effect—it is obvious that any restriction of membership by The Associated Press has greatly facilitated and stimulated the growth of competitive news-gathering services.

The following figures as to the other major news services show how far The Associated Press is from monopolizing or dominating the news-gathering field:

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* While AP serves more newspapers than UP in the United States alone, the total number of UP's newspaper subscribers here and abroad exceeds the total number of members of AP. As of October 27, 1942, AP had 1,252 domestic and foreign members. (R. 117, 1432). As of September 30, 1941, UP had 1,372 domestic and foreign newspaper subscribers. (F. 51, R. 2613).

United Press.

The United Press was incorporated in 1907, seven years after the formation of The Associated Press (F. 39, R. 2611). It furnishes a complete and comprehensive world-wide news service, and through affiliates under common control also supplies news pictures and features (F. 40, R. 2611). The total expenditures of the United Press and its affiliates in 1942 were $10,033,502.04, as compared with $11,305,577.84 for The Associated Press (F. 50, R. 2613; F. 19, R. 2609).

It differs from The Associated Press primarily in that it is organized for profit. Accordingly the users of its service are termed subscribers rather than members (F. 39, R. 2611).

It maintains 94 news bureaus here and abroad, with 1,326 full-time employees and 2,088 "string" correspondents (F. 41, 42, 44, R. 2611-2). In addition, local and domestic news is obtained from 560 daily newspapers, 24 semi-weekly newspapers, and 457 radio stations (F. 41, R. 2611), and foreign news is obtained from various foreign newspapers, radio stations and agencies (F. 42, R. 2612). It advertises that over 56,000 persons contribute to its news-gathering service (R. 1557-8).

News gathered by the United Press—directly and through its secondary sources—is collected, broken down, classified, re-written and thereafter distributed as its distinctive "copy" (F. 43, R. 2612).

The United Press has grown up since the organization of AP and is unquestionably the fastest growing of the three major news services in the country. Starting with 369 newspapers and other subscribers in 1907, it had grown to have 1,991 subscribers in 1941 (F. 54, R. 2613). Its newspaper subscribers alone in the latter year were 981 domestic

and 391 foreign papers—a total of 1,372 (F. 51, R. 2613). The basic news report of UP averages 750,000 words a day (R. 1481). Hundreds of its domestic newspaper subscribers show their preference for the UP news report by subscribing to the UP service, though these papers, which are in communities where there is no AP member, are actively sought as members of AP (R. 1908-30).

The court below found that the United Press provides a service comparable in size, scope of coverage and efficiency with that of The Associated Press (Op., R. 2584; F. 36, R. 2610-11).

Its own advertisements state that it is "The largest and most far-reaching news service in the world", with "hundreds" more clients than any other service and a rank of "first place among the world's news services" (Williams, R. 1556 A).

International News Service.

The International News Service is a department of King Features Syndicate, Inc., a New York corporation, organized in 1909 (F. 56, R. 2614).

This service, like the United Press, was organized for profit (F. 56, R. 2614).

The International News Service, with the other departments of King Features Syndicate, Inc., furnishes worldwide news, news pictures and features (F. 56, R. 2614). 37 news bureaus, with 313 employees and 1,864 "string" correspondents, are maintained throughout the world (F. 57-8, 63, R. 2614-5). Additional news is obtained from domestic and foreign newspapers, radio stations and news agencies (F. 57-8, R. 2614). News is collected, edited and distributed by the International News Service in the same manner as by the other agencies (F. 59, R. 2614).

The aggregate expenses of all the various departments (news, news pictures and features) associated with this service were $9,434,376.65 in 1941 (F. 64, R. 2615), a little less than those of The Associated Press and the United Press (F. 19, 50, R. 2608; 2613).

The International News Service, according to the findings below, provides a news service comparable in size, scope and efficiency with that of The Associated Press (Op., R. 2584; F. 36, R. 2611). Its domestic subscribers in 1941 included 338 newspapers and 182 radio stations (F. 62, R. 2615). According to the International News Service, this service emphasizes quality rather than quantity news reporting—specializing in covering news by the highest paid, ablest and most famous reporters obtainable (R. 2111; 2112). INS claims superiority in foreign news (R. 2111; 2119)—in Washington news (R. 2112)—in pictures (R. 2128-9; 2131; 2132) and in comics and features (R. 2134).

The New York Times Syndicate.

The New York Times Syndicate is one of the 20 to 30 other news agencies which—though smaller than AP, UP and INS—nevertheless were found by the court below to furnish substantial news reporting services (F. 36, R. 2610-1). The larger of these services could be expanded—if there were sufficient need—to supplant virtually any service (R. 1311; 1613-14).

The New York Times Syndicate distributes the news collected by The New York Times. The Times employs 903 people, including full-time employees and "string-men", in collecting domestic news (R. 2086). It has 24 representatives in Washington (R. 2086) and string men in every State capital in the United States and every large city (R. 1613; 2097). It has a staff of 63 foreign correspondents (R. 2087). It has news arrangements with the leading

foreign news agencies (R. 2087). It spends over $2,700,000 (R. 2095) a year upon its own news-collection service, exclusive of payments made for the news services of other agencies (R. 2095).

The Times Syndicate has available for the use of its subscribers 75,000 to 80,000 words of news each day (R. 2091), covering fully and adequately the news of all important communities of the United States, the news of a number of smaller communities, and the news of foreign countries (R. 1613-4). Its news dispatches are transmitted to subscribers over wire connections in the same manner as those of other agencies.

If AP, UP and INS went out of business tomorrow, the subscribers to The New York Times service would still be in a position to publish newspapers with world-wide coverage (R. 1614).

Chicago Tribune—
New York News Syndicate.

This Syndicate is another of the substantial news reporting services (Op., R. 2586; F. 36, R. 2610-1).

It furnishes to subscribers generally domestic and foreign news "copy," amounting to 15,000 to 20,000 words a day (R. 2000), plus features and comics, as prepared by the combined staffs of the Chicago Tribune and the New York Daily News.

In addition it offers to newspapers west of the Mississippi all of the news collected by The New York Times reporters (except local New York news of spontaneous origin) (R. 2002), the expenditures of the three newspapers furnishing this combined service aggregating over $6,790,000 a year (R. 2484, 2085-6).

This Syndicate likewise has arrangements, directly or through its member newspapers, to acquire news from other domestic and foreign newspapers and news agencies (R. 1994-6). The combined service could, if needed, be expanded to supply domestic and foreign news fully adequate for the successful conduct of the most substantial newspaper (R. 1311).

New York Herald-Tribune Syndicate.

This organization is still another of the substantial news reporting services (Op., R. 2586; F. 36, R. 2610-1).

This service offers to subscribers the news of 83 New York reporters, 10 Washington reporters, 131 active domestic string correspondents, and 11 foreign correspondents (R. 2042-3). It has a string man in nearly every important city in the country (R. 2051).

This Syndicate is highly popular in the news field. Its spot news service was furnished to approximately 113 newspapers in the United States and 6 in Canada in 1942 (R. 2053; 2230).

Other Services.

In addition to the news agencies above mentioned there are other services too numerous to discuss here, including Transradio Press (R. 495, 1216), the Los Angeles Times News Bureau (R. 493, 556, 2099-2104), North American Newspaper Alliance (R. 494, 557, 2171-2186), Reuters (R. 493, 2072 *et seq.*), and the Chicago Daily News Foreign Service (R. 493, 1980-4).

There are at least 20 to 30 of these other news agencies, all of which were found by the court below to provide substantial news reporting services (Op., R. 2586; F. 36, R. 2610-1).

AP Membership Not Necessary to Start or Continue a Newspaper.

As we have shown, other successful news agencies have grown up and flourished since the organization of The Associated Press. Accordingly all three judges below agreed that The Associated Press has no monopoly and does not occupy a "dominant" position in respect of the gathering or distribution of the news (R. 2629).

We desire to point out further, however, that the judges also agreed that membership in The Associated Press is not necessary to success in operating a newspaper (R. 2593; 2602).

The record is barren of a single instance in which The Associated Press, by its membership policy or otherwise, has ever

—prevented the starting of a single newspaper;

—prevented the successful operation of a single newspaper;

—or caused the discontinuance of a single newspaper.

On the other hand, the record is replete with evidence as to newspapers which have freely prospered without membership in The Associated Press.

The defendants introduced cumulative evidence with respect to a large number of such papers in the form of affidavits (R. 1725). The following are a few examples:

The New York Daily News, without Associated Press news, achieved the largest circulation of any morning newspaper in the United States (F. 75, R. 2616).

The New York Journal, without Associated Press news, maintained for years the largest circulation of any evening newspaper in the United States* (F. 77, R. 2617).

The Chicago Sun, without Associated Press news, in only a little over a year attained the eighth largest circulation of all full size morning papers in the United States and the eleventh largest circulation of all morning papers including tabloids (R. 1011; F. 82, R. 2618).

The *Washington Times Herald*—is one of the largest and most successful papers in Washington—and has become so without AP in competition with AP members (Noyes, R. 1429; F. 83, R. 2618).

The Cleveland Press, without Associated Press news, has consistently led the evening field in Cleveland both in circulation and in advertising lineage (F. 78, R. 2617).

The Harrisburg, Pa., Evening News, without Associated Press membership, in every year since 1923 has had a larger circulation than its AP competitor (F. 81, R. 2617).

The New York Daily Mirror grew, without AP membership, to have a daily circulation of 603,621, and a Sunday circulation of 1,340,911, becoming an AP member in 1937 after this circulation had been achieved (F. 76, R. 2616).

The Pittsburgh Press, without AP membership, not only successfully competes with its AP rival, The Pittsburgh Sun Telegraph, but has a larger circulation by over 65,000. In advertising lineage it surpasses all newspapers in Pittsburgh (F. 79, R. 2617).

The *Baltimore Evening Sun* operated until 1928 with only UP. Mr. Patterson's affidavit says,

> "I know from my personal knowledge that *The Evening Sun*, utilizing only UP wire service from

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* The *News* and the *Journal* eventually became Associated Press members by merger with other papers which were AP members.

1910 to 1928, *was able to compete—and did compete successfully*—with the other evening newspapers in Baltimore, and established itself *as one of the predominantly successful evening newspapers in the United States"* (R. 1775).

Other large papers which do not use AP are as follows:

	Circulation
Los Angeles News	113,000
Birmingham, Alabama, Post	75,000
Oakland, California, Post Inquirer	48,000
San Francisco News	98,000
Boise, Idaho, Capital News	23,000
Peoria, Illinois, Star	35,000
Indianapolis Times	92,000
Wichita, Kansas, Eagle	53,000
Detroit Times	319,000
Springfield, Massachusetts, News	48,000
Camden, New Jersey, Courier	56,000
New York PM	89,000
Cincinnati Post	150,000
Columbus, Ohio, Citizen	73,000
Philadelphia News	129,000
Houston, Texas, Press	71,000
Fort Worth, Texas, Press	39,000
Seattle Star	62,000
Madison, Wisconsin, State Journal	24,000

(R. 1133 *et seq.*)

The following excerpts from affidavits of the editors and publishers of some of the newspapers which do not use Associated Press news show that Associated Press membership is not necessary to the success of a newspaper—not only in the case of large papers but in the case of smaller papers as well:

Cleveland Press:

"In connection with the operation of The Cleveland Press I have found the United Press news service adequate, timely and complete for the purposes of The Press.

"The United Press is in my opinion at all times adequate and in times of economical, political and social unbalance has exhibited a superior comprehension in its coverage and its far-sightedness to anticipate eventual crises in affairs" (Seltzer, R. 1732).

Chester Times, Chester, Pa.:

"The United Press gives a complete news service covering all the news. * * * it is not true to say that it is necessary for a daily newspaper in order to have a good success, to be a member of the Associated Press" (Hill, R. 1749).

Bronx Home News, New York City, N. Y.: (an evening daily paper with 130,000 circulation which competes successfully with the AP papers in New York City (R. 1746).

"The Home News * * * never has missed prompt coverage of an important news item" (Goodwin, R. 1747).

Daily News, McKeesport, Pa.:

"* * * it is not true that a daily newspaper really needs membership in the Associated Press" (Mansfield, R. 1754).

Hoboken Jersey Observer, Hoboken, N. J.:

"I have never considered that we have been at any competitive disadvantage" (Fagan, R. 1742).

Humboldt Standard, Eureka, Calif.:

"* * * membership in the Associated Press has been available * * * but the publishers of the Standard have not seen fit to [join]" (Crothers, R. 1794).

Journal-News, Nyack, N. Y.:

"We do not believe that such a membership [in the Associated Press] would add anything" (Baker, R. 1734).

The Daily Register, Harrisburg, Ill.:

"* * * there is not enough difference between them [United Press and Associated Press] to make the use of one rather than the other a factor of any real importance" (Small, R. 1769-70).

Moberly Monitor-Index, Missouri:

"A paper can utilize but a very small part of the very large amount of news furnished by any of these services. All three of them are good. We operated the Maryville Democrat-Forum successfully with the International News Service pony report. Later we operated it with success using the United Press service" (Todd, R. 1845).

Newburgh News, Beacon News, New York:

"Both of these papers have used the United Press and use it today. The United Press provides full, adequate and complete news coverage. Neither of these papers has ever had the Associated Press. Both are successful papers and are popular in their communities. Associated Press membership has been available for these papers at any time I care to make application. In fact, we have been urged repeatedly by a representative of the Associated Press to substitute its service for that of the United Press.

"I am so satisfied with the service I have received from the United Press, and with the completeness of its service, that I see no reason to change to the Associated Press, and prefer to continue with the United Press" (Keefe, R. 1749-50).

East St. Louis Journal, Ill.:

"In September, 1932, the East St. Louis Journal used the telegraphic news reports of the United Press and continued to do so until January, 1935. The Journal used the telegraphic news reports of International News Service from October, 1933, until November, 1938; between January, 1935 and June, 1938, it used the telegraphic news reports of the International News Service exclusively.

"Between June, 1938 and April, 1941, the Journal received telegraphic news reports of Trans-Radio Press and between November, 1938 and April, 1941, it used the telegraphic news reports of Trans-Radio Press exclusively. Since April, 1941 and up to and including this date (June 9, 1943) it has used the telegraphic news reports of the United Press exclusively.

"During all this period, since September, 1932, the paid circulation of the East St. Louis Journal moved upward and is today continuing to gain

. . . . . .

"Moreover, the news reports of the International News Service and Trans-Radio Press each have been used exclusively by the Journal in East St. Louis without any loss in circulation or advertising patronage. The circulation of the Journal continued to increase during the periods when the news reports of the International News Service and of Trans-Radio Press were used exclusively" (Lindsay, R. 1833-4).

For a long list of other newspapers operating without Associated Press membership but using other agencies, see pages 1908-30 of the record. For example, the court below specifically found that there are more than 600 domestic newspapers which are subscribers to UP and are not members of AP (F. 68, R. 2615-16).

Not only do non-AP papers find the services of other agencies entirely adequate, but the record shows that newspapers switch from one service to another. The total lack of monopoly power in The Associated Press is nowhere better demonstrated than by the following comments of representative newspapers which have *discontinued* Associated Press membership in favor of the United Press service—to mention but one of the principal competitors of the Associated Press:

Altoona Mirror, Altoona, Pa.:

"* * * the service of the United Press is fully adequate" (Slep, R. 1768).

* * * * * *

"As noted above, my paper, the Mirror, has not had Associated Press Service since 1922. It has had opportunities and could have renewed its Associated Press service, but it has found the United Press service satisfactory and has not desired to change. Altoona is a city of upwards of 80,000, and the the Mirror had in September, 1942 a circulation of 26,930. We maintain ourselves successfully with the United Press Service and no other" (Slep, R. 1768).

* * * * * *

"It is my opinion that the press service on which a daily newspaper depends, namely, whether it depends on Associated Press service, or on United Press service, or on service of the International News Service, is not a factor determinative of success or the contrary. I am sure that a paper will

succeed with either Associated Press service or United Press service, if it has a good and competent management, and that a paper which is incompetently managed will not succeed, whichever service it takes" (Slep, R. 1768).

Brooklyn Daily Eagle, Brooklyn, N. Y.:

"The disposition of the Associated Press service was not detrimental" (Schroth, R. 1766).

Erie Daily Times, Erie, Pa.:

"I could not think it a disadvantage [to leave the Associated Press] in the face of the fact that my paper maintains a circulation of over 45,000 while its competitor with Associated Press service has a circulation of approximately 35,000" (Mead, R. 1758).

Merrill Herald, Merrill, Wisconsin:

"The experience of the Merrill Herald shows that the Associated Press service is not necessary to the successful existence of a daily newspaper. A newspaper is not vitally affected by receiving one complete news service covering the whole field, rather than another. The vital factors in success or not, relate to the management and conduct of the paper, and not to what news service is received. I do not mean that one service may not be better than another; but neither the service of the Associated Press nor that of the United Press is necessary to full success.

* * * * * *

"The undersigned, as publisher, felt that the news of the United Press would be more spritely presented" (Chilsen, R. 1736-7).

Middletown Times Herald, Middletown, N. Y.:

"• • • the Middletown Times Herald does not find membership in the Associated Press necessary for the successful publication of a newspaper" (Koons, R. 1752).

Nevada State Journal, Reno, Nevada:

"Towards the end of the year 1931, the Nevada State Journal ceased to take the Associated Press Service and severed all connection with the Associated Press. Since then it has been taking the United Press Service. It has a daily circulation of upwards of 9,000 and 11,000 Sundays in a population of approximately 22,500 for the City of Reno.

"• • • the United Press gives a satisfactory and complete service" (McDonald, R. 1756).

News-Democrat, Goshen, Indiana:

"The publication relies on the United Press service exclusively, and has done so for twenty years by preference" (Kinnison, R. 1750).

Olean Times-Herald, Olean, N. Y.:

"It [the United Press] is a complete news service, providing the needs of a daily newspaper fully.

• • • • • •

"When the Olean Times and the Olean Herald were consolidated we had the choice of whose service. Our decision was to continue the United Press service which is still the only news service we have. We did not then, nor do we now, feel that the Associated Press service is necessary for the production of a successful newspaper" (Fitzpatrick, R. 1745).

Pasadena Post, Pasadena, Calif.:

"• • • my experience proves to me that a daily newspaper can be operated successfully, without the Associated Press news reports" (Prisk, R. 1764).

Quincy Patriot Ledger, Quincy, Mass.:

"As to any idea that membership in the Associated Press is necessary to a daily newspaper, the experience of the Patriot Ledger * * * proves that there is nothing in that" (Schmitz, R. 1765).

Rawlins Republican-Bulletin, Rawlins, Wyoming:

"Since receiving the United Press service our subscriptions have increased" (Alcorn, R. 1733).

Star-Free Press, Ventura, Calif.:

"* * * a daily newspaper having the United Press service is in a position to succeed fully" (Pinkerton, R. 1762).

Warsaw Union, Warsaw, Indiana:

"The service rendered by the United Press service is a complete and comprehensive service. It covers everything" (Nusbaum, R. 1760).

Summary as to Effect of AP.

The situation as to the effect of AP upon (1) other agencies and (2) non-member newspapers was summed up by Judge Swan in the portion of his dissenting opinion previously referred to as follows (R. 2602):

"Clearly the provisions of A.P.'s by-laws as to admission of members have had no tendency to create a monopoly in news gathering—witness the growth of U.P., I.N.S. and other news gathering agencies. Nor is there proof that they have stifled competition between member newspapers and other newspaper owners or prospective publishers. Not a single instance has been adduced where a newspaper failed because it lacked an A.P. membership or was not started because the intending publisher could not obtain one. On the contrary, numerous papers have attained great success without such membership."

The Ratio Decidendi of the Majority.

The Novel Doctrine of "Full Illumination".

The majority of the court below held that it was illegal for a news-gathering organization—such as The Associated Press—to keep its "copy" for its own use.

According to the majority, such agencies are not entitled—as other men are—to the fruits of their own efficiency and enterprise. But—in the language of the majority opinion below—they are

> "bound to admit all on equal terms (Op., R. 2599).
>
> . . . . . .
>
> "to deprive a paper of the benefit of any service of the first rating is to deprive the reading public of means of information which it should have (Op., R. 2595).
>
> . . . . . .
>
> "The effect of our judgment will be . . . to compel them to make their dispatches accessible to others" (Op., R. 2600).

The majority imposed this obligation upon The Associated Press

—not because it had a monopoly;

—not because it occupied a dominant position;

—not because it had power over either

—other agencies or

—non-member newspapers;

—not even because it was better or more efficient.

The decision was based upon an entirely novel doctrine of "full illumination."

The public need for "full illumination," according to the majority, transcends the legitimate self-interest of the

members in their own copy—and prevents them from keeping it for their own use.

No case in the books that we have found supports this doctrine. It is an entirely novel suggestion—invented for the first time in this suit—and one which discriminates between the gathering of news and other business, and subjects it to special and peculiar obligations.

From the standpoint of the law, this question will be discussed later in the brief. We desire at this point, however, to discuss it from the standpoint of the facts.

Based on Controverted Assumptions.

This doctrine of "full illumination" is based upon certain unspoken factual assumptions—not supported by any finding of fact—namely,

(1) that it is clearly necessary—in order to secure adequate illumination—to require A. P.—and other agencies of the first rank—to share their copy with everyone who may apply;

(2) that more and better news will be secured in this manner than would be by leaving the press to operate under the same incentives that stimulate the enterprise of other men;

(3) that to put the press under permanent detailed supervision on a public-utility basis will not in fact do more harm than good.

We deny these unspoken premises. They are assumptions which, to say the least, are very highly controversial. They cannot be assumed as the basis of summary judgment in this case, since no summary judgment can be given except upon facts which are clear beyond any reasonable dispute.

How did the majority below think that The Associated Press had prevented "full illumination"?

We do not understand that it is contended that AP has ever prevented the public from receiving information as to any important fact. The court made no such finding.

All of the leading agencies supply substantially the same straight news (R. 1799; 1802). The aim of all is objectivity —unbiased news and comprehensive news. There is no finding that the other leading agencies fail—or are even inferior—in achieving that objective. The affidavits—both of those agencies and of non-AP papers—affirm the adequacy of their service.

"Beats" and "scoops" in these days of rapid communication are few and far between (R. 1679). The record shows, despite the advertising claims of all agencies, the progressively diminishing importance of such items. In any event, they cannot possibly give more than a few hours priority. There is not the remotest probability that beats and scoops may deprive the public of any significant information.

The so-called beats and scoops become tips for other papers and agencies the moment they are published. Whoever gets the item first, the other papers and agencies are immediately tipped off. They call up their own local representatives or the local authorities, confirm the facts and publish them immediately. The universal use of the telephone has revolutionized the newspaper business in this regard (R. 2005-6; 2032-3; 2171).

There is no possibility of preventing such tip-offs. The newspaper world is a whispering gallery and the different papers watch each other like hawks. Papers published by AP members, for example, are on their rivals' desk as soon as the earliest edition appears. If they contain anything of interest that their rivals do not know, calls are made within a few minutes to secure confirmation from other agencies, from local authorities, from relatives, from

eye-witnesses, and from local correspondents (R. 2004-6). Items appearing in Eastern papers are checked, confirmed and re-published in later editions in the East and in first editions in the West.

Thus, practically speaking, every fact that is of any substantial significance is available for publication in *every* newspaper within a few hours no matter who publishes it first.

"First flash" news reporting is of no perceptible importance in the eventual development of considered public opinion.

This is not to say that rivalry for beats and scoops is not a stimulus to competitive effort. As a result of such competitive effort one agency will at times report a particular event ahead of another.

But regardless of who is the first discoverer, the reading public gets the "benefit" of the discovery—so far as the essential information is concerned. And the "varying lights" are increased, rather than diminished, by limiting the number of papers which can print exactly the same text, leaving the information to be published in different forms by others.

It was suggested below that different editors might give the same news item different treatment in the way of headlines or location in the paper. What a particular editor does with a particular item is a matter of his personal judgment as to its importance in his community and the type of paper he wishes to make. If the matter is of any importance he will get it—whatever agency he takes. What he does with it is not dependent on what agency he gets it from. There is nothing that the AP or any other agency can or should do to control his individual editorial policy.

Multiplicity of Sources of Illumination.

AP news is not kept secret. The whole idea is that the members want to publish it—they want to publish it *themselves*. AP news dispatches were in fact being published in papers having approximately 35,500,000 circulation every day at the time this case was filed (F. 86; 87; R. 2618; 2619).

Moreover, there are almost innumerable other sources of public illumination. There were 2,097 daily papers in 1938. In addition there were 10,783 weeklies, semi-weeklies or tri-weeklies, and 596 Sunday papers. (*Small Daily Newspapers under the Fair Labor Standards Act*, U. S. Department of Labor, Wage and Hour Division, Economics Branch, June, 1942, p. 5).

Transportation facilities have so improved that today newspapers are no longer confined to the cities in which they are published. They circulate far and wide. Even towns where only one paper is published are not confined to that one paper but in fact offer the reader a choice of several other competing papers shipped in from other cities.

The weekly magazines—such as Time, News Week and Life—contain accounts of the important news of the world, accompanied by analysis, discussion, and a presentation of opinions. Such weeklies are read by enormous numbers of people.

The serious monthly and bi-monthly periodicals—such as Harper's—The Atlantic—The Nation—The New Republic—The New Masses—The American Mercury—The Readers Digest and other similar "digests"—and the careful "Reviews" published by the various universities—are likewise of great importance. These also analyze and interpret the news, with studies of the considerations pro and con in respect to all matters of serious social or political significance.

In addition there are very large numbers of miscellaneous periodicals—such as financial publications, trade journals, and trade union publications—which analyze the news from the standpoint of different economic groups.

The various agencies of the Government itself—the many colleges and universities—and other private institutions of research and opinion—through thousands of releases—discuss and analyze the news for the benefit of the public.

The radio is a relatively new but fast rising influence which is becoming more and more comparable to that of the press itself. The radio plays an enormous part in the dissemination of news and the formation of considered public opinion. Over 800 standard broadcasting stations—operating on an average of 16 hours a day—devote a large part of their time to news and to discussion programs.

The motion picture newsreel is another news distributing channel of rapidly growing importance.

Finally—all matters of any but the most ephemeral significance are discussed throughout the country in books, in the reports of learned societies, upon the pulpit, the lecture platform, and in business, social and political discussions.

Under all these circumstances it is inconceivable that the by-laws of AP have had any substantial effect in the way of preventing "full illumination". Their effect—if any—could not have been anything other than *de minimis*—completely invisible and imperceptible.

The "Personal Impress."

The majority of the court below does not seem to have rested its decision upon any thought that the public is not illuminated as to the essential facts themselves—the straight news. It seemed, rather, to rest its decision upon

the fact that the different services would present the same facts in a distinctive style and manner—and that all papers should have access to AP—and, inferentially, other important news agencies—in order to secure a multiplicity of "facets and colors" (Op., R. 2595).

But distinctiveness in the manner of expression is the very thing which gives "copy" its value. The "personal impress" to which the court refers is the very essence of intellectual property. Every newspaper needs a distinctive presentation of the news to justify its separate existence. It needs a distinctive presentation—not because it is better—but merely because it is different. Thus the larger metropolitan papers—such as The New York Times, The New York Herald Tribune, the Chicago Tribune, and many others—published in cities where other papers also take the same news services, whether AP, UP or INS—spend enormous sums of money to establish their own reporting service for the very purpose of having something in their columns which is distinctive—to set them apart from other papers (R. 2000; 2086-7). The sums expended by them for news from agencies is but a small fraction of what they spend in gathering news themselves—in the effort to get distinctiveness (4% for AP in the case of The New York Times) (R. 1612-3).

If every paper published the same dispatches from the same agency there would then be no multiplicity of "facets"—the public would receive the same program at "every station on the dial"—and from the public standpoint there would be little to choose between them. The public would not support a multiplicity of papers presenting the same facets.

The Judgment Tends to Diminish—Not Increase—Illumination.

The best way to secure a multiplicity of "facets"—if such be desirable—is to give each of the several agencies adequate incentive to expend the maximum energy and efficiency in collecting and distributing the news. If every paper is served by the same agencies as every other paper—then no news agency can offer anything which will make a paper distinctive. No paper can or will pay so much for service of that kind. Thus the effect of depriving the agencies of the "fruits" of their own enterprise would be to weaken their incentive and their capacity to collect the news. The effect of such a requirement would be to weaken the efficiency of all the agencies—the public would not be as well served as it is now.

A requirement which would result in weakening both the papers and the news agencies is certainly not in accord with "public policy."

Moreover, relatively few of the papers in the smaller communities can afford to subscribe to two agencies or desire to do so. If AP—and the other leading agencies—were compelled to serve every paper that applied—it is entirely possible that whatever agency is most popular might really—in a measurable degree—become a monopoly (R. 1313). In that case—instead of having more facets presented to the public—there would be less.

Indeed the Government itself apparently regards this as the natural—and desirable—result of the relief for which it asked. The Government complaint specifically alleges that a multiplicity of agencies results in "wasteful duplication" (Par. 48, R. 10).

The majority of the court below likewise took the position that even if AP did become the only news-gathering agency, no public injury could result. It said (Op., R. 2600):

> "The argument appears to be that if all be allowed to join AP, it may become the only news service, and get a monopoly by driving out all others. That is perhaps a possibility, though it seems to us an exceedingly remote one; *but even if it became an actuality, no public injury could result.*"

This position on the part of the Government and on the part of the court is completely inconsistent with the entire basis of the decision below—namely, the need—not for a single "facet"—but for a multiplicity of "facets."

Moreover, if it should come about that there were only one agency—or an agency having a monopolistic position—then, as the court itself pointed out at another point in its opinion (Op., R. 2594), the only conceivable result would be special government regulation.

Such regulation would not, in practice, be limited to making the reports of all agencies available to all comers—but would inevitably culminate in insidious governmental pressure as to what—when—and how—news should be presented to the public.

As we shall hereafter show, that would have very serious consequences upon the freedom of the press.

Conflict With Other Public Policies.

To repeat—there is no factual basis in this record which could possibly justify a court in finding as an uncontroverted fact, on a motion for summary judgment, that any

clear necessity exists for transferring the press from the field of private enterprise to the status of a public utility.

Neither can it be found that such a step would result in more or better "illumination" than would result from encouraging a multiplicity of competing agencies—stimulated by the usual incentive—the right to enjoy the fruits of their own industry.

Moreover, the public policy invented and relied on by the court below contravenes the public policy established by the First Amendment—namely, that the press should not be put in leading strings—even under the guise of "protecting" the public interest. This point will be discussed hereafter at pages 100 to 109.

It is in direct conflict with another, more fundamental public policy—the policy embodied in the Constitution itself—namely, that the press shall be as free as possible from discriminatory administrative control.

The By-Laws of The Associated Press.

Admission to Membership.

As we have seen, the thing which The Associated Press produces for the benefit of its members is "copy." Its members—like other men—have a legitimate self-interest in the fruits of their own efficiency and enterprise. The AP has never held itself out to share these fruits with all newspapers,—and the court below so found (F. 8, R. 2607).

They would have been entirely justified if they had decided not to take in any additional members whatsoever—or not to take in more than one member in each city. The "copy" created by The Associated Press has value—a distinctive presentation of the news. From a publisher's standpoint a large part of the value of that copy lies in its

exclusiveness (F. 29, R. 2609). The members ought not to be compelled to share that "copy"—before publication—with their competitors.

On the other hand, AP has never regarded itself as a "closed" organization. Its by-laws have always contained provisions for taking in new members, and since its organization, in 1900, more than 1890 members have in fact been taken in (F. 28, R. 2609). Of course this does not mean that the membership has increased by that number, for there is a turnover in newspaper affairs as in other forms of enterprise.

The total number of members of AP in 1942 was 1234 regular members and 13 associate members. Its original membership at the time of its organization was 603, so that by the taking in of additional members its membership has approximately doubled.

Formerly, existing members had a right of protest against the admission of an additional member in the city and "field"* in which the existing member was operating. If he chose to exercise this protest right a four-fifths vote of the members was required for admission.** This has been changed.

Article III of the by-laws—as they stand today—provides that any newspaper may be admitted by a simple

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*The word "field" is a word of art. In newspaper parlance the day is divided into "fields". A morning paper is said to be in the morning "field"; an evening paper in the evening "field"; and a Sunday paper in the Sunday "field".

Originally the right of protest extended over a wider area than the very community and field in which the member's paper was published—but this area was reduced between 1916 and 1925 (R. 1426).

** The By-Laws of the defendant The Associated Press have never given any member power to veto the election of new members.

vote of a majority of the regular members.* At one time a four-fifths vote was required where there was already an existing member in the same "field," but since April 1942 the by-laws have permitted admission by a bare majority (R. 44, 68).

A majority vote is a normal and customary requirement for group action of almost any kind. If the defendants are to have any right at all to choose their own associates, then a majority vote is reasonable.

The court below did not consider, as a basis for its decision, the evidence introduced by the Government with regard to the admission of members in the past. It said that

> "Therefore we disregard all the evidence as to admission of members in the past; not because that is not pertinent, but because it is not persuasive enough to put the issue beyond substantial question" (Op., R. 2581).

In this connection, however, we desire to point out that over 200 of the present members have in fact been admitted since 1900 in areas covered by the rights of protest of other members—without counting the large number of elections of such members who have since resigned (R. 1907). The

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*The provisions of Article III of the By-Laws which relate to voting are as follows:

> "Sec. 1. An owner of a newspaper, as defined in Article II, Section 1, subdivision (b) of these By-Laws, may be elected to membership by the affirmative vote of not less than the majority of the regular members of the Corporation voting on the application, in person or by proxy, at any regular meeting of the members of the Corporation, or at a special meeting called for that purpose.
>
> * * * * * * * *
>
> "Sec. 3. Applicants for membership may also be elected by the Board of Directors, when no meeting of the members of the Corporation is in session, in a field in a city where there is no existing membership at the time the application is filed" (R. 68, 69).

existing members in these cases had expressly waived any objection to the newcomers, but in 6 cases new members were admitted without such waiver (R. 1460-2).

Ordinarily there is no benefit to AP as an organization from taking in an additional member in fields where other members already exist. It adds substantially nothing either to the revenues or the news coverage of AP. The assessments are based upon the total potential circulation in the field, and where two or more members occupy the same field, the assessment is not increased but merely divided between them.

Nor does the taking on of an additional member in the same field ordinarily increase the news coverage of AP with respect to local news in any appreciable way. For important news AP relies largely upon its own staff, and ordinarily AP would receive no substantial benefit with respect to local spontaneous news from taking on an additional member where other members already exist.

However, as stated above, the record shows that a very substantial number of the new members since 1900 have been admitted in areas where there were already existing members.

Bondholders' Vote.

In connection with the vote by members for admission, the court also discussed the fact that the by-laws provide that in dealing with certain matters additional votes are given to those who have subscribed to the capital of AP by the purchase of bonds.

Apparently it did this upon the erroneous assumption that the provision with respect to the bondholders' vote is applicable to voting for the admission of members. That is not the fact. The bondholders' vote does not apply to the

election of new members—but only to the election of directors (see Article VII of the by-laws, R. 77).

It is purely a matter of the internal organization of AP, and has no possible bearing upon any of the issues of this case. In any event, however, it is difficult to see why the arrangement should be regarded as improper.

Members are permitted to subscribe for bonds in proportion to the amount they pay in assessments. They are given one vote for each $25 of bonds held by them. The maximum amount of bonds that can be held by any one newspaper is $1,000. Thus the maximum voting power which a newspaper can secure can be obtained by contributing the modest sum of $1,000 to the capital of AP.

As previously stated, the bondholders' vote applies only to the election of directors. It is merely a limited recognition of the principle followed in nearly all business enterprises—that influence in management should be somewhat commensurate with contribution to the joint enterprise.

The unimportance of this whole matter is evidenced by the fact that in only two instances has the bondholder vote differed from the popular vote in the election of directors (F. 127, R. 2625).

In actual operation this does not mean that the Board of Directors is not representative of the membership generally. It is composed of representatives of large papers, of medium sized papers, and in accordance with the by-laws there are always at least three directors chosen from among the newspapers published in the smaller communities. The evidence shows that the management of the Association is just as considerate of the influence and problems of the small newspapers as it is of the larger ones (Harte, R. 1814; Horne, R. 1824-1829; Matthews, R. 1838).

There is no indication that the members from the smaller communities are not fully in accord with the

larger members and the management with respect to the policies which are the subject of this case. This is evidenced by the fact that this brief has been written in collaboration with a "Special Committee of Associated Press Members in Smaller Communities," representing over 800 of the smaller members of the Association.

Initial Payments.

Membership in AP involves a very substantial proprietary interest. Its tangible property has a value of more than $7,000,000. In addition its good-will and other intangible property are appraised at a value of more than $12,000,000—making a total of $19,000,000 in tangible and intangible assets (F. 20, R. 2609).

The members also have an interest in the news dispatches—the "copy" which is developed by the AP organization. This is intellectual property belonging to the members.

As previously shown, it is a matter of the highest importance to each paper to have "copy" for its own use which is different—if only in the form of literary expression—from that published by other papers in the same community. For that reason newspapers in communities where there are other AP members often take great pains and go to great expense to develop something which will differentiate their columns from those of other AP newspapers (see discussion *supra*, p. 39).

The right to receive this distinctive "copy" from an agency such as the AP of course has a considerable value. As the court below specifically found, a large part of the value of news lies in its exclusiveness, reliability and newness (F. 29, R. 2609). To compel a member of AP to share that copy with others is to deprive him of that value—to a very substantial degree.

It is entirely reasonable, therefore, that a new member should be expected to make some payment in consideration for

—sharing in AP assets;

—sharing in the good-will and going-concern value built up by former members;

—sharing in its distinctive "copy";

—the injury caused to other members in the same field by depriving them of the distinctive quality of the AP service;

—the cost to such members of compelling them to make additional efforts to secure something different from the AP dispatches—which will thereafter be shared by them with the newcomer.

He should not expect to reap where he has not sown.*

Under all the circumstances, how can anyone say that it is unreasonable for a new member to make an entrance payment equal to 10% of the assessments previously paid by the other members in the same city and field.**

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* It was asserted by the Government below that this payment was equivalent to giving the existing members "a free ride" for a limited period. But if the new members were admitted without payment—as the Government contended they should be—then the "free ride" would be the one enjoyed by the new member—at the expense of the old members who have invested their time, effort and money to create the thing of value which he now seeks to enjoy.

** The by-law as to the amount of the initial payment where there are pre-existing members in the same field is contained in Article III, Section 2 (a) (R. 69), and reads as follows:

> "The applicant shall pay to this Corporation a sum equal to ten (10%) per cent of the total amount of the regular assessments received by the Corporation from members in the field (morning, evening or Sunday) in the city in which the applicant has been elected to membership, during the period from October 1, 1900, to the first day of the month preceding the date of the election of the applicant."

Formerly it was also provided that this sum must not be less than three times the current annual regular assessments, but that provision was dropped by an amendment to the by-laws made on February 9, 1943 (Op. R. 2582; F. 12, R. 2607).

Certainly this issue cannot be held to be undisputed in this proceeding for a summary judgment—in view of the testimony and other evidence to the contrary (R. 1321; 1430).

Neither is it unreasonable that the amount so paid be divided among the other AP members publishing papers in the same city and field.* Their contributions have gone into the building up of the assets of AP. They are the ones who have supported it, have advertised it, and have built up its good-will in their community. They are the ones who will be injured by the diminution to them of the value of its dispatches by the loss of their distinctive character.

It is sophistry to take the position that the members have already been fully recompensed for their assessments by the receipt of AP dispatches in the past. Obviously this is not correct. Everything that AP represents has been built up out of those contributions. Insofar as it has value, that value is the property of those who built it up, and if they are required to share it with others, they are entitled to the compensation.

Neither is it subject to proper criticism that no entrance payment is required for membership in communities where no AP paper previously existed. In such cases AP itself and all its members are benefited by securing additional coverage and revenue.

The applicant is pioneering in a field where public acceptance and good-will have not been locally created.

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* This is provided for in the last paragraph of Art. III, Sec. 2 of the By-Laws (R. 69).

Admission by Purchase of Other Papers.

The Government, below, attempted to attach some significance to the fact that no entrance payment and no members' vote is required upon the transfer of a pre-existing member-paper to a successor.* The court in its opinion, however, paid no attention to this point, and in so doing the court was clearly right.

It is only reasonable for a successor paper to be deemed in privity with its predecessor. It is only reasonable for AP to give assurance to its members that in case they desire for any reason to sell their business they can treat the AP membership as one of their assets and assure a purchaser that such membership will be continued.

Such transferability is a normal incident of any proprietary interest.

Such transfers have been relatively few—only 35 of the present members became members in that way (F. 122, R. 2624).

Waiver of Exclusive Rights With Respect to Other Agencies.

The Government also objected to the requirement that a new member shall relinquish any exclusive right that he may have to the news and picture service of any other agency and see that it is made available to other AP members in the same field in which he is asking for admission.**

This is a reasonable application of the equitable principle of mutuality.

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* This is provided for in the By-Laws, Art. II, Secs. 3 and 4; R. 66, 67.

** By-Laws, Art. III, Sec. 2(b), R. 69.

A new member ought not to expect existing AP members in the same field to share their AP copy with him unless he is willing to put the AP members upon terms of equality, competitively, with himself, and to share with them the copy of any agency to which he may be exclusively entitled. It is not fair for him to keep as his own exclusive possession the distinctive "copy" of other agencies at the very moment that he is asking AP members to share their distinctive copy with him. And if the applicant is willing to waive his exclusive right to the news of other agencies, there would seem to be no commercial reason why the other agencies would not extend their service to the AP members in the same community.

In any event, there is no reason why the applicant should expect to be put in a better position than the AP members. He should not expect the local AP members to share their distinctive AP copy with him—while at the same time he refuses to share his exclusive service with them.

However, these are minor matters and not the major issue in this case. They are mere trivia compared with the fundamental question whether newspapers—merely because they are newspapers—are to be subjected to discriminatory public-utility obligations—to be compelled to share their "copy"—before publication—with others—and to be subjected to permanent administrative control by the court and by the Department of Justice.

By-laws Against Disclosure of the News Reports.

The Government also attacked the provisions of the by-laws designed to protect the news dispatches against disclosure to non-members—either the AP dispatches themselves—or the local spontaneous news collected by the

members and supplied to AP to aid it in preparing the AP dispatches.

These by-laws are discussed in detail *infra* p. 91, and to avoid repetition we refer to that discussion without duplication here.

Opinion of the Attorney General Approving AP.

The by-laws of The Associated Press were specifically approved by the Attorney General of the United States in a carefully considered opinion rendered March 12, 1915, during the administration of President Wilson. The New York Sun had complained to the Attorney General because it had not been admitted membership in AP. Mr. Gregory, the then Attorney General, made a careful study of the AP by-laws and their operation and rendered an opinion in which those by-laws were specifically approved—except for one matter, which, upon his suggestion, was immediately eliminated (R. 895; R. 53, 63).

The Attorney General fully recognized as correct the principle of law that AP as a private enterprise was under no obligation to share its copy with others. He said (R. 897):

> "* * * it is no violation of the Anti-Trust Act for a group of newspapers to form an association to collect and distribute news for their common benefit, and to that end to agree to furnish the news collected by them only to each other or to the Association; provided that no attempt is made to prevent the members from purchasing or otherwise obtaining news from rival agencies. And if that is true the corollary must be true, namely, that newspapers desiring to form and maintain such an organization may determine who shall be and who shall not be their associates.

"This, of course, is not to say that such an association might not develop into an unlawful monopoly. The facts adduced, however, in my opinion do not show that that has happened in the case of The Associated Press."

Origin of the Present Suit.

The present suit arose as the result of an application by Marshall Field for AP membership in Chicago on behalf of his recently established paper—*The Chicago Sun*.

The Chicago Sun began publication December 4, 1941. It grew so rapidly that within approximately a single year it had the eighth largest circulation of all the full sized morning dailies—and the eleventh largest of all the country's morning dailies including tabloids (F. 82, R. 2618). The Sun already had the services of five other agencies—namely, the news services of the United Press, the New York Herald-Tribune Syndicate, the North American Newspaper Alliance, Transradio Press and Reuters (Field. R. 1014, Padulo, R. 1226). At that time the number of words supplied to a morning paper in Chicago by AP and UP, respectively, was approximately the same—273,000 by AP and 264,000 by UP (R. 2040)—and the *Sun* could have received more UP if it wanted to (R. 1263-4).

It claimed to supply a better news coverage to its readers than its Associated Press competitor. It claimed that

> "The Sun is giving Chicago more news than it ever had before in a morning paper" (R. 1342).*

* For other advertisements by The Chicago Sun setting forth the rapidity of its growth in circulation and advertising and its repeated claims that its news coverage in all departments is superior to that of its AP competitors see—as to foreign news, R. 1328; 945—as to domestic news, R. 1341—as to Washington news, "No other Chicago newspaper can touch The Sun's Washington coverage" (R. 1343)—as to sports news, R. 1350; 948—as to all news, R. 937—as to growth in circulation and advertising, R. 940; 916; 935.

Mr. Field sought membership in AP in addition to his five other news services. It is only proper to state, however, that he did so in a manner that could only be expected to antagonize. He applied for membership September 24, 1941 (R. 285). He was notified October, 2, 1941, that in view of the fact that there was another AP member in his "field" in Chicago, his application would be referred to the members at the next annual meeting in April, 1942 in accordance with the requirement of the AP by-laws (R. 289).

Mr. Field thereupon wrote, on October 24, 1941, that he must be admitted immediately, without submitting the matter to the vote of the membership—and threatened anti-trust proceedings against The Associated Press (R. 289-294).

Seven days later Mr. Field's attorney conferred with the Attorney General of the United States (R. 808).

Mr. Field's application was referred to the membership, as he had been told it would be, and he was so notified on January 28, 1942 (R. 295).

On January 30, 1942, Mr. Field and his attorneys conferred again with the Attorney General, and on February 5, 1942, Mr. Field filed with the Attorney General a formal complaint charging The Associated Press with violation of the anti-trust laws (R. 808, 816).

He then commenced to solicit proxies (R. 297).

The Anti-Trust Division of the Department of Justice meanwhile—and during the very period when Mr. Field was soliciting proxies in favor of his application—called upon The Associated Press to submit specified data, and a squad of 26 agents of the FBI was sent out to interview AP members in various parts of the country concerning the solicitation of proxies by those opposed to Mr. Field's application (R. 1430; 1776; 1777; 813; 886).

Mr. Field failed to receive the required majority vote from those whom he was charging with violation of the anti-trust laws. The vote was 684 to 287 for rejection (R. 32; 129).

Mr. Field's method of applying for membership was hardly calculated to commend him to the members, and many who would have voted for him under other circumstances did not do so,—though a very substantial number did vote to admit.

Many members felt that the Department of Justice was being used to intimidate them into voting in favor of the Field application, and their vote was principally a vote against such coercion (R. 519, 538; 1776-7); otherwise they might have voted for the application (R. 129-30).

Four months after this vote the present suit was filed by the Department of Justice (R. 1).

An application on behalf of the Washington (D. C.) *Times-Herald* came up for vote at the same time as that of Mr. Field's. The Washington *Times-Herald* is one of the most successful papers in Washington. It has both the UP and INS services and has operated for many years in active competition with papers having AP service—so successfully that its circulation has materially increased year by year (F. 83, R. 2618). Its all-day circulation is greater than that of any other Washington paper (R. 1078, 1091, 1122, 1135; F. 83, R. 2618).

This application came up for a vote at the same time as that of Mr. Field and under the atmosphere then existing was rejected (R. 131).

The court below ignored all evidence with regard to both these applications—both in its opinion and in its findings of fact—saying (R. 2581):

> "* * * we disregard all the evidence as to admission of members in the past."

Proceedings in the Present Case.

As previously stated, the defendants filed answers to the complaint, and thereafter interrogatories were also filed and answered. Examinations before trial were had.

Thereupon the Department of Justice filed affidavits and applied for summary judgment under Rule 56. This rule permits summary judgment only where

"There is no genuine issue as to any material fact."

The Government therefore waived all controversial issues and elected to stand upon those facts—and those facts alone—which were admitted beyond any real dispute.

The 2 to 1 opinion of the court, substantially in favor of the Government, has been discussed above at pages 3-11.

The findings of fact and the conclusions of law are in the record at page 2606. The judgment is at page 2630.

The Judgment.

Article I of the judgment (R. 2630) declared illegal and ordered to be cancelled the membership by law provisions of The Associated Press, and further enjoined the adoption of any new by-law having like purpose and effect. It required that any new by-law shall affirmatively declare that the effect of admission upon the ability of an applicant to compete with members shall not be taken into consideration in passing upon his application.

As we shall hereafter show, this in effect imposes an obligation upon AP to admit competitors of members. The opinion shows that this was the intention of the court. It was also the intention of the Department of Justice (See infra, pp. 60-63).

Articles II to IV of the Judgment (R. 2631-3) declare illegal the provisions of the AP by-laws intended to protect the AP news against disclosure to non-members, and also a

somewhat analogous provision in a contract with a supplementary news-gathering agency, The Canadian Press, intended to protect against disclosure to anyone other than AP the news supplied to AP by CP for use in the United States. The court held that these non-disclosure provisions were not illegal *per se*. It enjoined them temporarily but provided for their reinstatement upon compliance with the requirements of Article I as to admissions to membership.

Since these secondary protective provisions were held entirely lawful *per se*—the effect of Articles II to IV is in substance a means of forcing a prompt compliance with Article I.

The defendants argue that this judgment should be reversed.

Assignments of Error.

The assignments of error on behalf of these defendants consist primarily of errors of law.

They will be discussed immediately hereafter. In view of that discussion, they will not be repeated here.

For an itemized list of these errors, the Court is respectfully referred to the appellants' assignments of error (R. 2635).

ARGUMENT.

The argument in this case will be under the following headings—representing the four major issues in the case:

I. A news-gathering organization—formed solely for the purpose of greater efficiency—and which is expressly found not to monopolize or dominate—is under no obligation to admit into membership and share its news "copy" on equal terms with other papers.

II. News-gathering organizations are not public utilities and should not be made such by judicial action.

III. The supplementary arrangements to prevent the disclosure of the news to others before publication are reasonable and lawful *per se* and should not be prohibited as a means of compelling AP to serve as a public utility.

IV. The decision below is in conflict with the public policy embodied in the First Amendment.

I.

A News-Gathering Organization—Formed Solely for the Purpose of Greater Efficiency, and Which Is Expressly Found Not to Monopolize or Dominate—Is Under No Obligation to Admit Into Membership and Share Its News "Copy" on Equal Terms With Other Papers.

The court below has applied to these defendants a novel and discriminatory principle—which in effect compels them to share their "copy"—before publication*—with their competitors.

It denies to them, for the express reason that they are members of the press, rights ordinarily enjoyed by others—the normal and legitimate incidents of private enterprise—namely, the right to select their own business associates and to keep for themselves what the court itself described as

> "the fruits of their foresight, industry and sagacity" (Op., R. 2594).

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* Of course, as this Court held in the leading case of *International News Service* v. *Associated Press*, 248 U. S. 215, the defendants also have certain rights in their copy even *after* publication. *A fortiori* they should not be compelled to share their distinctive copy with their competitors *before* it has been published.

It did not do this on any theory that The Associated Press had monopolized or dominated

—the collection or distribution of the news—or

—the means of transmitting the news—or

—access to the original sources of the news.

On the contrary, the court expressly held that it had not done any of these things (C. IX, X, XI, R. 2629).

As we have already shown, there are two other agencies comparable in size, comprehensiveness of coverage and efficiency, and from twenty to thirty additional agencies which also supply substantial news-reporting services, (*supra*, pp. 17-22).

The Associated Press does not seek to drive out of business any news-gathering agencies competing with it. The other agencies have grown up and flourished since the organization of The Associated Press.

Neither does The Associated Press control the means of access to the successful publication of a newspaper. Hundreds of newspapers—including some of the most successful—have been founded and have flourished without membership in The Associated Press. Many have rejected or abandoned the service of The Associated Press because of preference for other services. (*Supra*, pp. 23-32; F. 71-83; R. 2616-2618).

The court below did not even find that The Associated Press service was superior to that of its principal competitors. It expressly disavowed resting its decision on that ground (R. 2593-4).

No demonstrable injury to the public is here involved.

The Associated Press has for years provided news reports which conform to the highest standards of accurate,

non-partisan and comprehensive news reporting (F. 26, R. 2609).

The Associated Press by its competition has forced other news services to conform to its high standards.

What, then, is the issue presented by this case?

The issue is whether The Associated Press must in effect become a public utility and admit to membership and share its news "copy"—before publication—with non-member competing newspapers.

And the reason for requiring it to do so is not inadequacy of competition—but a novel conception of public policy—namely, that such a requirement is necessary to further the "illumination" of the public. This is not because the facts themselves, the straight news, are not already available, but because each agency supplies a distinctive presentation of the facts—"a personal impress" (Op., R. 2595). Consequently—said the majority—every newspaper should have access to "any service of the first rating" (Op., R. 2595).

This is in effect putting The Associated Press—and, by a parity of reasoning, every other efficient news agency—upon a public-utility basis.

Effect of the Ruling Below.

It is true that the judgment—perhaps as a result of the dissenting opinion—in form avoids directly stating that AP is hereafter to operate as a public utility.

In form the judgment prohibits any by-law under which the members may "take into consideration" the effect of admission upon the ability of the applicant to compete with other members in the same city and field (Judgment, I, R. 2630). But the reasoning on which the opinion is based shows clearly what the majority of the court intended. The majority said:

> "• • • to deprive a paper of the benefit of any service of the first rating is to deprive the reading public of means of information which it should have • • •" (Op., R. 2595).

Again the majority referred to The Associated Press as

> "a combination which, though bound to admit all on equal terms, does not do so" (R. 2599).

The illusory character of the device by which the majority sought to avoid a direct command to act as a public utility is shown by the statement in the majority opinion:

> "Although, as we have said, only a few members will have any direct personal interest in keeping out an applicant, the rest will not feel free to judge him regardless of the effect of his admission on his competitors" (R. 2592).

And, finally, the majority themselves described the effect of their judgment as follows (Op., R. 2600):

> "The effect of our judgment will be, not to restrict AP members as to what they shall print, but only to compel them to make their dispatches accessible to others."

Judge Swan, in his dissenting opinion, shows that he fully understood the purpose and result of the opinion of the majority—saying (R. 2602):

> "What, then, is the ground for holding that the by-law provisions have resulted in an unreasonable restraint of trade either in news gathering or in newspaper publishing? Solely the court's view that a news gathering organization as large and efficient as A.P. is engaged in a public calling, and so under a duty to admit 'all "qualified" applicants on equal terms.'"

The Government in its complaint specifically asked for a decree which would require the admission of all applicants (R. 36, Par. IV); and by its appeal is here asking that the decree be re-framed to make even clearer that it does so (Government Assignment of Errors No. 3, R. 2667).*

The defendants themselves will be in grave danger if they construe it otherwise.

Under the principle of law laid down in this decree they will be regarded from now on as "bound to admit all on equal terms" (Op., R. 2599)—by a judgment the effect of which is said by the court itself

> "to compel them to make their dispatches accessible to others" (Op., R. 2600)

—and under a rule of public policy which, according to the majority below, makes it illegal to deprive any paper of the benefit of their services (Op., R. 2595).

Under these circumstances, to reject any paper will inevitably subject these defendants to harassment by contempt proceedings and to private litigation.

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* The Government's Assignment of Error No. 3 reads as follows:

"The Court erred in refusing to enter a final judgment enjoining the defendants, and each of them, from promulgating, agreeing to observe and observing, any new or amended by-laws of The Associated Press authorizing denial of membership in The Associated Press for any reason other than (1) that the applicant is not the sole owner of a bona fide newspaper published in the United States, (2) that the applicant has not assented in writing to the lawful by-laws of The Associated Press, or (3) that the applicant has not paid to The Associated Press any money contribution which its by-laws may require new members to pay and which is based upon the new member's equitable proportion of the value of the net tangible assets of The Associated Press and is applicable irrespective of whether the new member's newspaper is or is not published in the same city and 'field' (morning, evening or Sunday) as the newspaper of an existing member." (R. 2667)

Regardless of any technicalities of language, the defendants are under no illusions as to what, as a practical matter, they are compelled to do by this decree. If, when they are asked to share their distinctive "copy" with competitors they cannot even "consider" their own legitimate self-interest, then any real freedom of choice is gone.

**A Discriminatory Principle—
in Conflict With Prior Cases.**

The general rule.

In other fields of industry the anti-trust laws have always been interpreted upon the general principle that the best way for the public to secure more and better goods and services—or, to use the court's expression, a variety of "facets and colors"—is to permit those who produce to enjoy the fruits of their own efficiency and enterprise.

From time immemorial businessmen generally have been permitted to associate themselves together for greater efficiency—in corporations—in partnerships—in exchanges—associations—joint ventures—and as principal and agent. Such cooperation has never been regarded as in restraint of trade—where the parties have not achieved monopoly or sought to injure others. Nor has it ever been regarded as improper for them to keep for themselves the fruits of their own efforts.

As stated by this Court in the *Tobacco* case, 221 U. S. 106, 179, and in innumerable cases thereafter, neither the common law nor the Sherman Act was intended to prohibit "normal and usual contracts to further trade."

This doctrine is accurately and fully stated by Judge—later Chief Justice—Taft in *U. S. v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 282 (C. C. A. 6th); affd. 175 U. S. 211. But that case is only typical of innumerable other cases to the same effect.

So here—The Associated Press is a normal and natural development organized for a normal and legitimate purpose—namely, for greater economy and efficiency in the gathering of the news—and not to injure or control others (Op., R. 2580). This Court itself has declared that the purpose of The Associated Press is

> "not only innocent but extremely useful in itself."

This Court said this in a case where The Associated Press was seeking to protect the fruits of its own enterprise from use by a competitor—the *INS* case, *International News Service* v. *Associated Press*, 248 U. S. 215, 235.

And the effect of the AP activities has not been to monopolize or to exclude others from the business (*Supra*, p. 4; F. 36, 39-64, 71-83, R. 2610; 2611-2615; 2616-2618; C. IX-XI, R. 2629).

To repeat—the courts have uniformly held that a co-operative organization does not violate the Sherman Act where

(1) the purpose is merely greater efficiency in carrying on the business of the organization itself and not to injure or coerce or control others; and

(2) the effect is not to monopolize or exclude others from the field.

The courts have also held that it is a normal incident of private enterprise that businessmen should have the right

(1) to choose their own associates—and

(2) to keep their own product for their own use.

These basic principles are exemplified in many cases, of which we cite the following:

The very case which is principally relied upon by the Government, and by the court below, is in reality a clear authority in favor of the defendants. We refer to *U. S. v. Terminal Association of St. Louis*, 224 U. S. 383. In that case the Court laid down exactly the principles which we have set forth above. It stated clearly that a cooperative organization which did not achieve monopoly does *not* violate the anti-trust law and need *not* admit outsiders; saying (p. 405):

> "It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals. But the situation at St. Louis is most extraordinary."

The extraordinary and distinguishing feature of that case, on which the Court relied, was the fact that because of the unique physical topography in the neighborhood of St. Louis, the Union Terminal in question had acquired every possible means of entering the city and was in position to keep every other railroad out.

Thus the Terminal Association had acquired a complete monopoly and was in position to exclude all competitors from the field. The Associated Press has no monopoly and no power to exclude.

The purpose of the anti-trust laws is not to set up public utilities or other forms of regulated monopoly. The only cases where the courts have permitted regulated monopolies under the anti-trust laws have been cases where illegal monopoly already existed—and where there was no practical way by which competition could be restored.

The recent *Soft-lite* case—*U. S.* v. *Bausch & Lomb Co.*, 321 U. S. 707—illustrates the proper rule where no monopoly exists. In that case, even though the Soft-lite Company had violated the Sherman Act in other respects, this Court was unanimous in holding that it was under no obligation to operate as a public utility.

The proper rule was stated by this Court in *U. S.* v. *Colgate & Co.*, 250 U. S. 300, 307, as follows:

> "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

No different rule because AP is a cooperative.

The application of the principles set forth above is not confined to any particular form of organization. The Sherman Act has always concerned itself with substance rather than with form.

Moreover, in the present case the cooperative form of organization is not harmful—but is conceded to be affirmatively beneficial. The Government itself says in its Complaint that one of the chief reasons for the general esteem in which The Associated Press is held is that:

> "* * * the character of the organization of The Associated Press—a membership corporation composed of persons representing every shade of economic, political, and religious opinion and every section of the country—is an invaluable guarantee that the promise and claim made by each news-agency—that it presents the news without any political or sectional bias—will in fact be fulfilled" (Complaint Par. 66, R. 18).

The testimony is clear and uncontradicted that this cooperative form of organization has stimulated its members to put forth extraordinary efforts beyond anything they were under any legal obligation to do (F. 25, R. 2609; R. 1836, 1840).

The Government concedes that the result has been a service which

> "has long been regarded as synonymous with the highest standards of accurate, non-partisan and comprehensive news-reporting (Complaint, Par. 66, R. 18).

Certainly a cooperative undertaking for such purposes and with such results cannot be made illegal by merely calling it a "combination." Of course AP is a combination—a combination to create "copy" for its members—unbiased copy—comprehensive copy. That is a purpose "not only innocent but extremely useful in itself." A combination for such "innocent" purposes is a very different thing from a combination to injure others.

Absent monopoly, domination, indispensability or coercion—it is not unlawful for men to create a cooperative for such "innocent" purposes or for them to keep the resulting "copy" for themselves. That is exactly what this Court said in the quotation from the *St. Louis Terminal Case*, set forth above p. 65.

It is inconceivable that there should be one rule for AP because it is a cooperative—and another for UP and INS because they are profit corporations.

It is inconceivable that *private* cooperative news-gathering agencies cannot exist.

Neither is it unreasonable or illegal that such a cooperative should want to keep the "copy"—the intellectual property they have created—for their own use. That prop-

erty has value. And as the court expressly found—a large part of that value

> "lies in its exclusiveness, reliability, and newness" —(F. 29 R. 2609).

In the whole history of the anti-trust laws we can find no basis for the suggestion that—absent monopoly, domination, indispensability or coercion—it is unreasonable or wrongful for men who have cooperated to produce something of value to want to keep that value for themselves.

The court below agreed that it was not illegal for AP to refuse to give its news to *non-members*—because

> "if a member were allowed to impart it to others who could use it simultaneously, its *chief value* would be gone; for *that rests upon priority*" (Op., R. 2598).

Accordingly the court held that the by-law prohibiting disclosure of the AP news reports to non-members was not illegal *per se* (Op., R. 2598; C. III, V, R. 2628-9; Judgment Pars. II, V, R. 2631-3). And from this holding the Government did not appeal. (See Gov't Assignments of Error, R. 2666.)

But if it is right for AP members to refuse to share the AP "copy" with non-members because that would destroy its "chief value" to themselves—it is wholly inconsistent to compel them to take in the very same applicants as members whom they do not want. Whether they are compelled to supply their copy to a non-member—or to supply it to the same person—as an unwanted member—the "chief value" of their copy is impaired in either case.

Further discussion of cases.

In addition to the cases already cited above, pages 63 to 66, the *Tobacco* case, the *Addyston Pipe* case, the

St. Louis Terminal case, the *Soft Lite* case and the *Colgate* case—there are many other cases in which the same general principles have been laid down.

For example, the numerous cases in this and other courts involving stock and commodity exchanges have always permitted such exchanges to have complete freedom to limit their membership and to retain for their own benefit, or for such applicants as they may select, the important news information collected by them. And they have never been denied these rights because of their cooperative form of organization.

In *Board of Trade* v. *Christie Grain and Stock Co.*, 198 U. S. 236, the largest cooperative grain exchange in the world collected price quotations and refused to serve anyone other than members and such applicants as it chose. The lower court denied that the association was obliged to furnish market news to all applicants

> "• • • merely because the Chancellor is of the opinion that his (its) business, originally private in its character, has grown to such magnitude that the public is entitled to an interest therein" (116 Fed., at 946).

This Court affirmed the decision below and sustained the right of the association to exercise control over its news "copy"—saying:

> "• • • there is no monopoly or attempt at monopoly, and no contract in restraint of trade, either under the statute or at common law" (198 U. S., at 252).

In *United States* v. *New York Coffee and Sugar Exchange*, 263 U. S. 611, the largest coffee and sugar exchange in the country limited its membership to a specified number. In upholding the legality, under the Sherman Act, of cer-

fair proceedings of this cooperative association, this Court held:

> "* * * nothing in the case sustains the view that those promoting and operating such an Exchange are themselves imposing a burden or restraint upon interstate commerce for which they may be indicted under the Anti-Trust Act" (p. 621).

In *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, the largest cotton exchange in the country limited its membership to 450 and limited the distribution of price quotations collected by it to members and other approved applicants.

The lower court denied that the cooperative organization was required to furnish its market news to all, saying:

> "* * * the Exchange is under no legal duty to sell its quotations to any particular person nor to all" (296 Fed., at 69).

This Court, in affirming, held that:

> "In furnishing the quotations to one and refusing to furnish them to another, the exchange is but exercising the ordinary right of a private vendor of news" (270 U. S., at 605).

In *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 74.4% of the producers of bituminous coal of the Appalachian territory organized a cooperative sales agency which fixed prices and otherwise regulated competition between the members. Membership in this cooperative was limited to 80% of the producers of this territory—other competitors being denied membership. The cooperative agency, however, had lawful objectives only—neither seeking nor achieving control of the market. This Court accordingly approved the cooperative venture as conforming to the Sherman Act—stating:

> "A cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint" (pp. 373-4).

In *Greer, Mills & Co.* v. *Stoller*, 77 Fed. 1 (C. C. W. D. Mo.), the court, in discussing the respective rights of a cooperative livestock exchange of substantial size and its members, affirmed the unqualified right of the cooperative organization to establish rules of membership and to withhold membership from applicants not qualifying thereunder:

> "* * * no court would issue a mandatory injunction compelling the admission of such an applicant to membership" (p. 8).

In *Mid-West Theatres Co.* v. *Co-Operative Theatres*, 43 F. Supp. 216 (E. D. Mich.), a cooperative association of moving picture theatres purchased film through a Board of Directors and Manager for its member theatres, and thereby obtained a greater bargaining power than individual non-member theatres. The court held that so long as the association used its power to obtain better terms for its members and not to control the trade of excluded non-members, the association was acting lawfully:

> "* * * If a member wants his Board of Directors or Manager to buy his pictures and thinks this an advantage, what law prevents such an arrangement?" (p. 221).

In *The Prairie Farmer Publishing Co.* v. *The Indiana Farmer's Guide Publishing Co.*, 88 F. (2d) 979 (C. C. A. 7th), cert. den. 301 U. S. 696; re-hearing den. 302 U. S. 773, the only cooperative group of farm newspapers in a certain region offered, through a common advertising agency, joint advertising rates lower than the aggregate of their separate

rates for advertising. A non-member farm newspaper which had been excluded from the cooperative sued the members for diversion of advertising. The court held that the cooperative was valid under the Sherman Act, even though non-members were excluded to their injury—saying:

> "Here, appellants, it seems to us, brought about a situation by agreement amongst themselves whereby in association they could reduce the cost of securing sustenance in the way of advertising in competition to a certain degree with national farm papers. • • • Unfortunately, appellee was not in position to meet that competition; but that fact, it seems to us, is one of the fortunes of development of industrial practices, and its existence should not stamp with the stigma of illegality the act of appellants" (pp. 983-4).

This decision (as to which this Court denied certiorari, 301 U. S. 696, and again denied re-hearing, 302 U. S. 773) shows that even though such an association achieves some competitive advantage as the result of its cooperative efforts, it is not illegal on that account.

Similarly, this Court in *Federal Trade Commission* v *Curtis Publishing Company*, 260 U. S. 568, 582, said:

> "• • • success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face."

Similarly, in *National Biscuit Company* v. *Federal Trade Commission*, 299 Fed. 733, 739 (C. C. A. 2d), the court said that the Commission had no power

> "to judge what is too fast a pace for merchants to proceed in business and to compel them to slow up."

In the Stock Exchange cases, it was undoubtedly an advantage to be a member of the Exchange, but the courts have never held that such exchanges are illegal because membership is restricted.

Moreover, in the present case, it should be remembered that the court did not find that The Associated Press had any advantage over other agencies. It did not even find that its service was superior to that of its principal rivals —saying, quite properly, that this was a matter of opinion which on the evidence was in dispute (Op., R. 2585).

It based its ruling entirely upon its doctrine of full illumination.

Moreover, a combination—otherwise lawful—does not become unlawful merely because it is somewhat larger than its next competitor. No one would dream of contending that the largest unit in every form of industry should be turned into a public utility merely because it is the largest. Size alone, even though attained by combination, is not an offense under the anti-trust laws. *United States* v. *United States Steel Corp.*, 251 U. S. 417, 451; *United States* v. *International Harvester C* . 274 U. S. 693, 708.

For the convenience of the Court, but without detailed discussion, we cite below some of the many cases in which cooperative associations, organized for a legitimate main purpose, have been allowed to withhold association privileges from non-members, regardless of their size:*

1. *Commodity Exchanges:*

American Live-Stock Com. Co. v. *Chicago Live-Stock Exchange*, 143 Ill. 210, 32 N. E. 274 (1892); *People ex rel. Dodson* v. *Board of Trade of Chicago*, 224 Ill. 370, 79 N. E. 611 (1906); *Garrigues Co.* v. *New York Produce Exchange*, 213 App. Div. 625 (1st Dept., 1925).

* Cases involving specific controlling legislation—as in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1—or a voluntary holding out to serve all comers—as in *New York & Chicago Grain & Stock Exchange* v. *Board of Trade*, 127 Ill. 153; 19 N. E. 855 (1889)—are, of course, distinguishable and have no bearing upon the general principle.

2. *Stock Exchanges:*

Matter of Weidenfeld v. *Keppler*, 176 N. Y. 562 (1903); *In re Hurlbutt, Hatch & Co.*, 135 Fed. 504, 507 (C. C. A. 2nd), appeal dismissed 198 U. S. 580; *Ketcham* v. *Provost*, 156 App. Div. 477, 484 (1st Dept., 1913), affirmed 215 N. Y. 631 (1915).

3. *Insurance Exchanges:*

Cline v. *Insurance Exchange of Houston*, 166 S. W. (2d) 677 (Sup. Ct., Tex. 1943).

4. *College Associations:*

State of North Dakota v. *North Central Association*, 23 F. Supp. 694 (D. Ill.), affirmed 99 F. (2d) 697 (C. C. A. 7th).

5. *Veterans' Associations:*

Chapman v. *American Legion*, 14 So. (2d) 225 (Ala. 1943).

6. *Cattle Owners' Associations:*

People v. *Holstein-Friesian Association*, 41 Hun 439 (N. Y. 1886).

7. *Newspapers and News Agencies:* There are numerous cases directly and specifically involving newspapers and news-gathering associations—which hold that they, like other private enterprises, have the right to select their own associates and to keep their "copy" for their own use. These cases are grouped and analyzed a little later in this brief, in dealing with the public utility question as

such. (*Infra*, pp. 82-87). Accordingly we refer the Court to that discussion, without repetition here.

The opinion of Attorney General Gregory, quoted *supra*, page 52, was clear-cut and explicit to the same effect.

Error of Court Below as to "Public Policy" and "Full Illumination."

The public policy applicable to business generally—as set forth in the cases cited above—is clearly that the public interest is best served by allowing business men the right

(1) to cooperate for purposes of greater efficiency,

(2) to choose their own associates; and

(3) to retain the fruits of their own enterprise as an incentive to competitive effort.

The court in this case has disregarded these fundamental principles. It has applied a novel principle never heretofore stated in any cases in the books, so far as we have been able to ascertain. It is a discriminatory principle—one applicable only to the press—*and because it is the press.*

We have already shown above (pp. 34-39) that there is no factual basis in the record for this new and discriminatory doctrine of "full illumination." We refer the Court to that discussion and shall not repeat it here.

In any event, it is highly controversial and earnestly disputed by the defendants. It cannot be assumed—*a priori*—as a basis for summary judgment.

Moreover, it is diametrically opposed to at least two other rules of public policy—namely,

(1) the public policy applied by the courts in the case of other enterprises;

(2) the public policy embodied in the First Amendment—that so far as is humanly possible the press

should not be put in leading strings—but should be left free from discriminatory administrative supervision and control.

The record in this case gives no basis for the assumption that the "illumination" of the public will be better secured by this discriminatory ruling than it would be by allowing the press to operate with the same freedom and subject to the same incentives as other forms of enterprise.

The normal incidents of private business should not be abolished with respect to the press, under the guise of a discriminatory application of the anti-trust laws—not for any lack of competition—but to promote in a speculative and highly questionable manner a general social aim.

Cases Cited by the Government.

None of the cases cited by the Government below condemn cooperative action for normal and legitimate purposes of greater efficiency—not involving monopoly, coercion, or control of others. For that reason—as pointed out by Judge Swan below—they are wholly inapplicable here.

We shall not attempt to discuss these cases individually, because we feel clear that the Court will see at once that they all involve the elements that we have mentioned. The cases chiefly relied upon may be classified broadly as follows, though in some instances the same cases involve both monopoly and coercion:

1. *Monopoly Cases:*

The following cases were clear monopoly cases, where the defendants, through group action,

(1) intended to attain monopoly;

(2) had attained monopoly; and

(3) had demonstrated both the purpose and the power through monopoly to exclude competitors from the trade or coerce outsiders:

United States v. *Terminal Association of St. Louis*, 224 U. S. 383;
Montague v. *Lowry*, 193 U. S. 38;
Standard Sanitary Mfg. Co. v. *United States*, 226 U. S. 20;
Ethyl Gasoline Corp. v. *United States*, 309 U. S. 436.

These cases obviously in no wise condemn any action of The Associated Press in this suit, because—as the court below squarely found—The Associated Press neither achieved nor intended to achieve monopoly.

2. *Coercion Cases:*

The following cases cited by the Government were typical cases of coercion, where the defendants

(1) were not seeking by cooperation to increase the efficiency of the group members, but

(2) were seeking, instead, to bring pressure to bear against other parties, and by this coercion to control their conduct or exclude them from the business,—and had the power to do so:

Loewe v. *Lawlor*, 208 U. S. 274;
Eastern States Retail Lumber Dealers Ass'n v. *United States*, 234 U. S. 600;
Thomsen v. *Cayser*, 243 U. S. 66;
Anderson v. *Shipowners Association*, 272 U. S. 359;
Binderup v. *Pathe Exchange, Inc.*, 263 U. S. 291;
Paramount Famous Lasky Corp. v. *United States*, 282 U. S. 30;

United States v. *First National Pictures, Inc.*, 282 U. S. 44;

Interstate Circuit, Inc. v. *United States*, 306 U. S. 208;

Fashion Originators' Guild v. *Federal Trade Commission*, 312 U. S. 457;

American Medical Association v. *United States*, 317 U. S. 519.

In this class fall the boycott cases, of which *Loewe* v. *Lawlor*, 208 U. S. 274, is typical. In the *Fashion Originators' Guild case*, 312 U. S. 457, for example, the defendants did not merely seek to create better patterns for themselves. They occupied a dominant position in the trade and sought to boycott and *drive out of business* competing manufacturers who copied their fashions—which the competing manufacturers had a perfect right to do.

These cases are irrelevant, because The Associated Press in no manner seeks to coerce, control or "dominate." The court below did not make any such suggestion, relying, instead, upon its new doctrine of "illumination."

3. *Price-fixing Cases:*

The following cases cited by the Government were cases where the purpose was price-fixing—not the legitimate purpose of accomplishing by cooperative action something which they could not accomplish separately:

American Column & Lumber Co. v *United States*, 257 U. S. 377;

United States v. *American Linseed Oil Co.*, 262 U. S. 371;

Sugar Institute, Inc. v. *United States*, 297 U. S. 553.

The inapplicability of these cases appears upon their face.

II.

News-Gathering Organizations Are Not Public Utilities and Should Not Be Made Such by Judicial Action.

The Associated Press is not a monopoly. Neither is it a public utility. It has none of the characteristics of either. A public utility must possess, according to well recognized principles, one or more of the following characteristics:

1. A public franchise or grant.
2. A holding out to serve all comers.
3. A monopoly.

The Associated Press has none of these characteristics.

1. It does not hold any public franchise or grant.
2. It does not in any way hold itself out to serve all comers (F. 8, R. 2607).
3. It is not a monopoly (C. IX-XI, R. 2629; see also discussion *supra*, pp. 11-14, 17-22).

Press associations are not within that relatively small group of "public callings" which constitute public utilities at common law.

Neither have they been made public utilities by any Federal statute.

The highest court of New York—the State in which The Associated Press is incorporated—has specifically held that a press association such as The Associated Press has the right to choose its own members and hence is not a public utility. *Matthews* v. *Associated Press*, 136 N. Y. 333.

Even though a business is one in which the public has an "interest"—and what industry is not?—that does not mean that it is a "public utility". It merely means that a legislature, if it sees fit, may subject it to appropriate regu-

lation. *Nebbia* v. *New York*, 291 U. S. 502, 531-2; *Olsen* v. *Nebraska*, 313 U. S. 236.

It does not mean that a court can exercise the legislative function where the legislature has not done so.

The court below relied upon the *Nebbia* case, *supra*. But in that very case this Court pointed out that, while the legislature might determine that public policy required the application of public-utility principles to a particular industry, nevertheless

> "The courts are without authority either to declare such policy or, when it is declared by the legislature, to override it" (p. 537).*

The Associated Press, accordingly, lacking any public-utility characteristics, and in the absence of any legislative action, may not be required to serve all comers. *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252; *Producers Transportation Company* v. *R. R. Commission*, 251 U. S. 228, 230-1; *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570; *Smith* v. *Cahoon*, 283 U. S. 553.

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* Similarly in *Atchison T. & S. F. R. Co.* v. *Denver & New Orleans R. Co.*, 110 U. S. 667, this Court held that it had no power to compel the Atchison to enter into the same joint traffic arrangement with the D & N O as it had granted to another connecting line—saying (p. 685):

> "Were there such a statute in Colorado, this case would come before us in a different aspect. As it is, we know of no power in the judiciary to do what the Parliament of Great Britain has done, and what the proper legislative authority ought perhaps to do, for the relief of the parties to this controversy."

Again, in the *Express* cases, 117 U. S. 1, it was held that in the absence of a statute a railroad which had entered into arrangements with one express company was not under any public-utility obligation to enter similar arrangements with other express companies—saying (p. 29):

> "The regulation of matters of this kind is legislative in its character, not judicial."

Not Justified by Sherman Act.

The majority of the court below has sought, in effect,

> "to compel them to make their dispatches accessible to others" (Op., R. 2600).

It does so under a sort of legal fiction that it may exercise the legislative function under the guise of applying the anti-trust law (Op., R. 2591, 2593-7).

But the anti-trust law is concerned primarily with adequacy or inadequacy of competition.

The court in this case finds no inadequacy of competition. It applies the anti-trust law solely because of a vague and highly controversial conception of public policy which it has invented as the result of its own *a priori* reasoning.

This "public policy" was thought by the majority to require that these defendants sacrifice their proprietary interest in their own "copy"—by sharing it with their competitors before they have had a chance to publish it themselves.

The minority, dissenting, pointed out the error of this ruling in language so clear that it can hardly be improved upon—saying (Op., R. 2602):

> "The business of gathering news is not one of those occupations which were recognized at common law as affected with a public interest. A. P. has never held itself out as ready to serve all newspapers. Nor has it been granted the power of eminent domain or any other public franchise which might justify imposing the duty to serve all applicants without discrimination. If such a duty is to be imposed on news gathering agencies, I think it should be by legislative, rather than judicial, fiat."

As previously shown, there is no precedent under the Sherman Act for imposing a public-utility obligation—not

because of any inadequacy of competition, but because of some general conception of public policy (*supra*, pp. 63-78; and especially pp. 65-68).

As said by this Court in *United States* v. *Cooper Corporation*, 312 U. S. 600, 606:

> "* * * it is not for the courts to indulge in the business of policy-making in the field of anti-trust legislation."

Again, as said by this Court in *United States* v. *Colgate & Company*, 250 U. S. 300, 307:

> "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

We are not dependent, however, upon general reasoning alone. There are many cases specifically holding that neither newspapers nor news-gathering agencies are public utilities—because of any supposed "public policy" or otherwise.

Newspapers Not Public Utilities.

It is clear that newspapers are not obligated to assume public-utility obligations of any nature. *Sharon Herald Co.* v. *Mercer County*, 200 Atl. 880 (Pa. Super. Ct., 1938); *Reeda* v. *The Tribune Company*, 218 Ill. App. 45 (1920).

The courts have specifically declared that newspapers are free:

> (1) To refuse to sell to whom they please. *Fisher* v. *News-Journal Co.*, 21 A. (2d) 685 (Del. Ch. Ct.); *Lepler* v. *Palmer*, 150 Misc. 546, 270 N. Y. S. 440, (1934); *Journal of Commerce Publishing Co.* v.

Tribune Co., 286 Fed. 111 (C. C. A. 7th); *Philadelphia Record Co.* v. *Curtis-Martin Newspapers*, 304 Pa. 372; 157 Atl. 796 (1931).

(2) To accept or reject advertising. *Friedenberg* v. *Times Publishing Co.*, 170 La. 3, 127 So. 345 (1930); *In re Louis Wohl*, 50 F. (2d) 254 (E. D. Mich.); *Mack* v. *Costello*, 32 S. Dak. 511; 143 N. W. 950 (1913); *Shuck* v. *Carroll Daily Herald*, 215 Iowa 1276; 247 N. W. 813 (1933); but *cf. Uhlman* v. *Sherman*, 22 Ohio N. P. (N. S.) 225 (Common Pleas Ct. of Defiance Co., 1919); and

(3) To refuse to publish material submitted to them. *Commonwealth* v. *Boston Transcript Co.*, 249 Mass. 477; 144 N. E. 400 (1924); *Lake County* v. *Lake County Publishing & Printing Co.*, 280 Ill. 243; 117 N. E. 452 (1917); *Wooster* v. *Mahaska County*, 122 Iowa 300; 98 N. W. 103 (1904).

News Agencies Not Public Utilities.

Similarly, the courts have held that news-gathering agencies are not public utilities. They are free to supply their news to whom they please. *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U. S. 236; *Moore* v. *New York Cotton Exchange*, 270 U. S. 593.

Thus this Court in the *Moore* case specifically said that the right to select news customers constituted

> "the ordinary right of a private vendor of news" (p. 605).

There are numerous cases to the same effect with regard to The Associated Press itself and its predecessors, holding that it is not a public utility—and that it has no obligation to admit others into membership or to deal with non-member newspapers.

Thus in *State ex rel. The Star Publishing Company* v. *The Associated Press*, 159 Mo. 410 (1901), the highest court of Missouri specifically held that the then Associated Press was not required to supply news to competitors of its members. The then Associated Press was deemed to be a collective person, entitled

> "• • • to contract where and with whomever and at what price he will" (p. 455).

It is interesting to note that the relator in that case—The Star Publishing Company—is the publisher of the St. Louis Star-Times, which—despite the fact that it is not a member of The Associated Press—has flourished ever since and has today a circulation in excess of 164,000 (R. 1139).

Again, in *Wilson* v. *Commercial Telegram Co.*, 3 N. Y. Supp. 633 (Sup. Ct., Kings Co., 1888), the court similarly ruled with respect to the then Associated Press as follows:

> "Is that association under a public duty to sell news collected by it to every newspaper that demands it, and offers to pay the usual price? Cannot it select its customers and sell to one paper in New York, and refuse one in Brooklyn? Undoubtedly it can'" (p. 639):

In *Dunlap's Cable News Co.* v. *Stone*, 60 Hun 583; 15 N. Y. Supp. 2 (1891), the court declared that the members of the then Associated Press:

> "• • • have a perfect right to limit the sale of the news which they collect" (p. 3).

In *Matthews* v. *Associated Press*, 136 N. Y. 333 (1893), the highest court of the State of New York held that the then Associated Press and its members could select their own members and hence were not subject to public-utility obligations.

In *Associated Press* v. *Washington News Publishing Company* (Equity Doc. No. 15,539, Sup. Ct. D. C., 1894; unreported) the court, in discussing the right of the then Associated Press to control the disposition of Associated Press news, declared

> "• • • it had the right to fix its own conditions and terms for the use of that news."

The foregoing cases involved press associations prior to the formation of the present Associated Press, but the cases since 1900, when the present Associated Press was organized, have been to the same effect.

In *International News Service* v. *Associated Press*, 248 U. S. 215, for example, this Court ruled that The Associated Press possessed exclusive rights to its news "copy", and enjoined the distribution of such "copy" by news-gathering competitors to

> "• • • newspapers that are competitors of complainant's members" (p. 239).

In *Associated Press* v. *Sioux Falls Broadcast Ass'n*, CCH Trade Regulation Service, Decisions Supp. 1932-1937, par. 7052 (S. D. So. Dakota, 1933), appeal dismissed by stipulation 68 F. (2d) 1014 (CCA 8th), the court squarely held that the by-laws of the present Associated Press, providing for the limitation of membership and news to existing members, were valid under the anti-trust laws—saying:

> "• • • the provisions of said By-Laws are proper and not in unreasonable restraint of interstate commerce."

Similarly, in *Associated Press* v. *Emmett*, 45 F. Supp. 907, the court denied that the refusal of The Associated Press to grant membership to competitors of members was

arbitrary or illegal. The court stated specifically (p. 919) that—

> "* * * no court can compel the Associated Press to sell a membership."

Indeed the Attorney General of the United States himself, in the opinion dated March 12, 1915, discussed above page 52, unequivocally affirmed the right of The Associated Press to withhold membership and news "copy" from competitors of its members (R. 897). He directly approved the membership provisions on the ground that—

> "* * * newspapers desiring to form and maintain such an organization may determine who shall be and who shall not be their associates."

The only case cited by the Government to support the theory that news gathering may be subject to public-utility obligations is the "discredited decision", to use the language of Judge Swan below, in *Inter-Ocean Publishing Co.* v. *Associated Press*, 184 Ill. 438; 56 N. E. 822 (1900). That case did not involve the present Associated Press, but involved a wholly different organization incorporated under the laws of the State of Illinois. The defendant in that case had been granted power of eminent domain to construct telegraph and telephone lines—and the court relied upon that fact in reaching its decision.

The case is contrary to the decision of *Matthews* v. *Associated Press of New York*, 136 N. Y. 333. The courts of other States have also refused to follow it. *State ex rel. Star Publishing Co.* v. *Associated Press*, 159 Mo. 410 (1901); *In re Louis Wohl*, 50 F. (2d) 254 (D. Mich.). It has been in effect repudiated by the courts of Illinois itself, and explained away as dependent upon the grant of eminent domain. *People* v. *Forest Home Cemetery Co.*, 258 Ill.

36, 41; 101 N. E. 219; *cf. Journal of Commerce Publishing Co.* v. *Tribune Co.*, 286 Fed. 111 (C. C. A. 7th).

The Illinois courts have specifically held that the *Inter-Ocean* case is not applicable to the present Associated Press. *The News Publishing Company* v. *The Associated Press*, 190 Ill. App. 77 (1914). They have followed, instead, the New York case of *Matthews* v. *Associated Press of New York*, 136 N. Y. 333.

The Courts Ill-Equipped to Supervise.

A court is ill-equipped, for obvious reasons, to supervise the application to press agencies of any doctrine that they are engaged in a public calling and "bound to admit all on equal terms" (Op., R. 2599).

Mr. Justice Brandeis, in his dissenting opinion in *International News Service* v. *Associated Press*, 248 U. S. 215, pointed out the undesirability of any attempt to regulate the business of news gathering by judicial action, saying:

> "Courts are ill-equipped to make the investigations which should precede a determination of the * * * circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations" (p. 267).

If the present judgment is affirmed, many questions of the most complex character will have to be determined by the lower court and eventually—through direct appeal—by the Supreme Court itself.

In the first place, if the present by-laws are wrong—what by-laws are right? What by-laws can be adopted with

respect to membership? This is a problem which the majority below has thus far avoided, but on which, if the present decree stands, it must eventually pass.

All of the injunctions in the decree—except those in Paragraph I—are to be lifted upon the adoption of the proper membership requirements. This in itself will require the court to determine what limitations, if any, are permissible under the ruling on "public policy" and "full illumination" laid down in its opinion as applying to news gathering.

And even if the defendants should not raise the question by applications to set aside those provisions of the judgment, the question will be raised by someone the moment any applicant is rejected.

Would it be permissible for AP to refuse to compel a small local paper to share its distinctive "copy" with a chain operator?

How distinguish between dislike of low standards of journalism and dislike of the effect of competition by applicants employing such standards?

Again, how will the court determine upon what terms different members are to be admitted? The opinion states that The Associated Press is

> "a combination which, though bound to admit all on *equal* terms, does not do so" (Op., R. 2599).

Obviously, however, it would be utterly impossible to apply "equal" terms to the different members of The Associated Press. Equality is not equity in such an undertaking. Are small members to make the same payments as large members—and if not how should the difference be determined? Is the court to determine the differences in treatment as between large and small members—new and

old members—papers of different actual or potential circulations—papers in different "fields"—papers who want full service and those who want part service?

Is the court to determine what rates will be charged for the same service to different members, and what choice will be accorded the different members as to what sort of "package" of news they may elect to take? How will a court handle complaints as to quantity and quality of service to particular members?

Furthermore, if the AP is obliged to take in members on a non-discriminatory basis, then, logically, it would be equally under obligation to continue treating them upon a non-discriminatory basis after they have been taken in. Accordingly the court would have to exercise continuing supervision over the relationship between the members even after they have been admitted.

Under the judgment the by-laws must, in effect, forbid the members to "take into consideration" their own self-interest in voting on the admission of new members (R. 2631). How, practically, can the Association police the inner workings of its members' thoughts? How can the members, as intelligent men, avoid consideration of the effect their vote may have, directly or indirectly, upon themselves? And if it should later be discovered that some members secretly did harbor such considerations, what must the other members do about it?

And, finally, if the effect of this judgment is to cause the service of The Associated Press to deteriorate through the lack of ability to enforce standards—or the withdrawal of desirable members—or the destruction of the *esprit de corps*—the willingness to do more than one is required to do which comes from a feeling of proprietary interest—or if The Associated Press is placed at a disadvantage in com-

petition with other agencies not subject to similar requirements—what will the court do about that?

In passing upon these questions the court will be little aided by experience in other fields of public utility law. The news is a product of the mind. It is not a standardized product—like water, gas, or electricity. The service of The Associated Press is not routine in character.

Its service—and particularly the equities between different members, communities and fields—do not lend themselves to exact quantitative measurement.

These are problems which are far better left to the practical judgment and the mutual accommodation of the parties themselves.

Failure of Congress to Act.

The complexity of these problems is emphasized by the fact that Congress itself has specifically failed to act upon them.

A bill seeking to convert The Associated Press into a governmentally regulated public utility was introduced in Congress in 1913, but was never reported out of committee (H. R. 1691, 63d Cong., 1st Sess.) Congress obviously saw no merit in such a proposal.

This failure to take action was in harmony with an earlier report of a Congressional committee in 1882, which summarily dismissed a proposal for a publicly-owned newspaper as "unwise, unnecessary, expensive and impractical" (House Rep. No. 175 of the 47th Cong., 1st Sess.).

III.

The Supplementary Arrangements to Prevent the Disclosure of the News to Others Before Publication Are Reasonable and Lawful *Per Se* and Should Not Be Prohibited as a Means of Compelling AP to Serve as a Public Utility.

The By-Law Agreement.

In addition to the membership provisions, the Government also objected to those provisions of the by-laws which forbid

(1) the communication of the AP "copy" to non-members, and

(2) the communication of local "spontaneous" news by members to non-members.

(By-laws, Art. VII, Sec. 4; Art. VIII, Sec. 6; R. 77; 80).

These provisions are obviously necessary to protect the value of the news dispatches which it is the object of the AP to gather and prepare. The disclosure of the AP news to others prior to its publication by the members themselves would obviously defeat the purpose of the Association. As said by this Court in *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, with respect to the news dispatches there in question:

> "It is established that the quotations are property and are entitled to the protection of the law and that the Exchange 'has the right to keep the work it has done, or paid for doing, to itself' " (p. 333).

In that case the Court also cited and reaffirmed the case *Board of Trade of Chicago* v. *Christie Grain and Stock Co.*, 198 U. S. 236, saying (205 U. S. at p. 338):

> "The right was clearly defined to be, the right of the Board of Trade to keep the quotations to itself or communicate them to others, and this is also the right of the Exchange in the case at bar. It can be violated not only by getting the quotations surreptitiously or 'in some way not disclosed,' or by getting them from a person forbidden to communicate them."

Moreover, it is not necessary to rely upon merely similar cases. These very by-laws of AP itself were approved by this Court in the case of *International News Service* v. *Associated Press*, 248 U. S. 215, 230, 241. In that case this Court said:

> "Under complainant's by-laws each member agrees upon assuming membership that * * * no member shall furnish or permit anyone in his employ or connected with his newspaper to furnish any of complainant's news in advance of publication to any person not a member. And each member is required to gather the local news of his district and supply it to the Associated Press and to no one else (p. 230).

> * * * * * *

> "Indeed, it is one of the most obvious results of defendant's theory that, by permitting indiscriminate publication by anybody and everybody for purposes of profit in competition with the news-gatherer, it would render publication profitless, or so little profitable as in effect to cut off the service by rendering the cost prohibitive in comparison with the return. *The practical needs and requirements of the business are reflected in complainant's by-laws which have been referred to*" (p. 241).

The court below, in the present case, unanimously agreed that both of these protective provisions of the by-laws were entirely reasonable and lawful *per se* (Op., R. 2598; C. III,

V; R. 2628-9; Judgment, Pars. II, III, V, R. 2632-3). It enjoined them only because of the provisions as to the admission of new members—and only "until the primary wrong is remedied" (Op., R. 2599). The judgment permits the defendants to apply for modification or termination of the injunctions when the membership by-laws have been modified to comply with the requirements of the judgment as to membership (J., V, R. 2633).

Thus, in effect, the injunctions against the protection of the news reports are really indirect means of compelling AP to revise its arrangements as to membership.

It is difficult to see how there could be any objection to the provision that the AP news reports should not be furnished to anyone except AP members—prior to their publication by the AP members themselves—and the Government has not appealed from the decision of the court below that such an agreement is not illegal *per se*.

It has appealed, however, from the court's approval of the provision requiring members not to supply their local "spontaneous" news to non-members (R. 2657).

It would seem, however, that this provision also is reasonably in furtherance of the purpose for which AP was organized—a purpose which is innocent and lawful.

The news collected by the members would be of little value to AP if the members were free to disclose it to others before it could be published by the AP members themselves. The agreement comes within the familiar rule that covenants ancillary to the transfer of property and intended to protect the value of the thing sold are proper. The rule is particularly applicable where the nature of the property itself is confidential information.

The relative importance of the local "spontaneous" news furnished by the members has greatly diminished (Op., R. 2580; *supra*, pp. 13-14).

The Associated Press, UP, INS, and other agencies maintain their own news bureaus at the principal news sources throughout the country, and in foreign countries. At all the principal sources they employ their own direct representatives, including great numbers of "string" correspondents.

The word "spontaneous" is in itself a limitation. The by-law does not apply to any material "which has originated through deliberate and individual enterprise"—such as interviews with prominent men or commentaries upon the significance of the news itself (R. 79). There is a great deal of local news which is not "spontaneous." Thus a fire is spontaneous news—but an investigation of inefficiency in the fire department is a matter of individual enterprise—and therefore is not spontaneous news and not covered by the by-law (R. 2026, 2040).

The members are entirely free to sell their news—other than local spontaneous news—as they see fit, and many of them do so.

Neither does the by-law apply to news pictures or features or news which is not "local."

Generally speaking, "local" news is of interest principally in the locality itself. Anything which achieves a wider significance is covered promptly by direct representatives of the various news agencies.

All the news services—and hundreds of individual newspapers—maintain their own reporting staffs at Washington, where 60 to 75% of the general domestic news originates (R. 2210).

The Associated Press maintains a staff of 3,454 part-time or "string" correspondents throughout the United States (F. 19, R. 2608).

The United Press maintains a similar staff of 2,088 part-time or "string" correspondents (F. 44, R. 2612). The

International News Service maintains 1,864 part-time or "string" correspondents (F. 63, 2615).

The record is filled with evidence as to the completeness and comprehensiveness of the news coverage by the other agencies. The record contains testimony and affidavits from representatives of a very large number of successful non-AP papers to the effect that—regardless of the AP by-law—they receive complete and satisfactory coverage of local and international news from other agencies. (See *supra* pp. 25-32.)

The same thing also appears from the testimony of the managers of those agencies themselves. The General Manager of the United Press specifically declared in an affidavit filed herein (R. 1482) that the AP provision with regard to local "spontaneous" news has

> "not prevented UP from obtaining local news of events of a spontaneous origin occurring in the United States."

The United Press obtains domestic local news from its own full-time employees and string men, and from 560 daily newspapers, 24 semi-weekly newspapers, and 457 radio stations (F. 41, R. 2611). It advertises that more than 56,000 persons are available to contribute to its news coverage (R. 1557-8).

Similarly the president of King Features Syndicate—of which the INS is a department—testified that the exclusive furnishing of local "spontaneous" news by members of The Associated Press to AP has

> "not interfered with the gathering of news by International News Service" (R. 2169).

Like the UP, the INS obtains its news through its own employees and "string" correspondents, supplemented by

news from domestic and foreign newspapers, radio stations and other news agencies (F. 57, 58, 62, 63; R. 2614-5).

The growth and success of these other agencies—and of the papers which employ them—speak for themselves. They completely refute any *a priori* reasoning on the subject. If the Government contends otherwise, its argument is not supported by the record below.

For the convenience of the Court we quote the opinion of the court below which fully supports the contentions of the defendants as to the reasonableness of these by-laws for the protection of the news reports against disclosure. It says (Op., R. 2598):

> "The second charge is against the by-law which forbids the communication of news by AP to non-members, and of 'spontaneous' news by members to non-members. The defendants answer as to the agreement not to disclose 'spontaneous' news, that it is ancillary to the collection and transmission to AP of that news itself. News, they argue,—as its very name implies—has no value after it has once been published; if a member were free to impart 'spontaneous' news to others who could use it before AP, the whole value of the grant would be gone. *Even if a member were allowed to impart it to others who could use it simultaneously, its chief value would be gone, for that rests upon priority.* As to the agreement that AP shall not impart news collected by it to non-members, similar considerations apply; they would lose all benefit of the expenses incurred in its collection unless they had priority. It is well settled, they continue, that a restrictive covenant necessary to the protection of property transferred is 'reasonable.' The most common one is an agreement not to compete with the buyer of a business, or of a professional practice, for a limited time and in a limited territory; but that, they insist, is only one

example of the general doctrine, which many and various decisions support. *We quite agree with all this:* taken by themselves, and apart from the restrictions upon membership, both agreements would be valid; *it is essential to the protection* of *the main purpose that the member who furnishes 'spontaneous' news, or AP itself, shall not destroy the value of what is transferred by making it available to others, before it can be published.*"

Thus the court specifically found that both of the by-law provisions for the protection of the news against disclosure would be valid except for the provisions as to membership.

If the court erred in its finding as to the invalidity of the membership provisions, then of course the injunctions as to these secondary protective provisions should also automatically go out.

The Canadian Press Agreement.*

The Canadian Press is a cooperative news-gathering agency in Canada. The Canadian Press and the AP are in a position to render supplementary service to each other by interchanging news. This they have done for a long period of years (the latest contract being dated November 1, 1935—R. 456; F. 134, R. 2625)—AP giving its news dispatches to The Canadian Press, and The Canadian Press in turn supplying its news to AP.

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* The complaint contained charges of exclusive interchange agreements with agencies in certain other foreign countries, but the evidence shows beyond any question that there were no such agreements in existence and have not been for many years. AP collects its own foreign news at the source instead of depending on those foreign agencies.

The court below did not even mention these charges in its opinion, in its findings or in the decree, and no issue concerning them is now before the Court.

AP agrees not to disclose to anyone else in Canada the news furnished to The Canadian Press, for use in Canada, and similarly The Canadian Press agrees not to disclose or permit its members to disclose to anyone other than AP and its members the news supplied to AP for use in the United States.

All of the principal American news agencies—including AP, UP, INS, the Chicago Tribune, and The New York Times—have their own news-gathering facilities in Canada, and many AP newspapers have their own correspondents in Canada and have news-report exchange arrangements with Canadian newspapers (F. 137-139, R. 2626).

UP has a wholly-owned subsidiary—British United Press, Ltd.—which operates directly in Canada and covers Canadian news. 53 Canadian newspapers and 39 Canadian radio stations are subscribers to the news service of British United Press. UP and British United Press exchange their news reports (F. 137, 2626).

Mr. Williams, the Vice-President and General Manager of the United Press—which receives the Canadian news through its subsidiary, British United Press, Ltd.—categorically stated in his affidavit:

> "The British United Press, Ltd. has not been prevented from obtaining local Canadian news by reason of any provisions of the by-laws of The Canadian Press or otherwise." (R. 1483.)

The INS also covers the news in Canada. It maintains a staff of correspondents in the important cities of Canada (R. 2149).

The Chicago Tribune maintains an elaborate staff of correspondents in most of the principal cities of Canada

(R. 1996), and makes such news available through the Chicago Tribune-New York News Syndicate (R. 2001-2).

The New York Times has a long standing association with the Montreal, Canada, Gazette for obtaining Canadian news (R. 2088). All of the news developed by the staff of The New York Times, which it obtains from sources other than AP and commercial news agencies, is made available to American newspapers through The New York Times Syndicate (R. 2089-91).

The court below held that these supplementary interchange agreements between AP and The Canadian Press are reasonable and are not unlawful *per se* (C. VII, R. 2629). It enjoined the agreement of The Canadian Press not to supply its news for use in the United States to others than AP only because of the AP membership rules, and only so long as these rules remain unchanged (Op., R. 2599; C. VII, R. 2629; J. IV-V, R. 2632, 3). It did not enjoin the agreement of AP protecting the news supplied to The Canadian Press in Canada—being of the opinion that this was a matter for the Canadian authorities to determine. While the Government assigned error to this ruling, we are advised by the Government that it will not press that assignment on this appeal.

The allegation that The Canadian Press agreement has restrained others in the collection of Canadian news was denied in the AP Answer (R. 124) and in view of such denial and the evidence adduced to the contrary there is no basis of uncontroverted fact by reason of which this Court on this motion can find that the Canadian agreement had any such results.

IV.

The Decision Below Is in Conflict With the Public Policy Embodied in the First Amendment.

As previously shown, the effect of the judgment below and the reasoning on which it is based—is to subject The Associated Press to permanent supervision. It does this upon a novel and discriminatory principle which applies to the press—because it is the press—and does not apply to other men.

The public policy embodied in the First Amendment is that the press should be more free—or at least not less free—than other industries. It requires that the press shall not be put in leading strings—that, so far as humanly possible, it shall be free from discriminating and complicated administrative or judicial controls.

The defendants do not wish to be misunderstood. They do not claim special privileges for their own benefit. The interest to which they refer is the interest of the public itself, because of the indispensable function of the press in any free society.

It serves on the one hand to interpret to the people the wishes of the Government. It serves on the other hand to interpret to the Government the wishes of the people. As said by this Court in *Grosjean v. American Press Co.*, 297 U. S. 233, 250:

> "A free press stands as one of the great interpreters between the Government and the people. To allow it to be fettered is to fetter ourselves."

Neither does the press claim immunity from the application of general laws—applicable to all members of the community.

But this is not a question of wage scales—or fire laws—or hours of labor. This is a discriminatory law—applicable to the press where it would not be applicable to other men.

It says that the press may be regulated—and it undertakes to regulate it—in such a manner that it shall have less freedom than others.

It denies to members of the press the right to enjoy the fruits of their own industry. It denies them the freedom to work under the same incentives which other men enjoy. It inevitably subjects them to living in permanent danger of being called to answer in contempt proceedings, without trial by jury, for "violations" of vague and intangible obligations.

It takes from the press the right to their own "copy"—the product of their minds—and compels them to share it with others before they publish it themselves.

It violates the fundamental right defined by Milton as early as 1644 in his *Areopagitica—A Speech for the Liberty of Unlicensed Printing*—as

> "The just retaining to each man his several copy: which God forbid should be gainsaid."

We should be unrealistic and naive indeed if we did not realize that there is a dynamic law that once an industry is subjected to an administrative control—peculiar to itself—that control constantly increases—and never retreats. Once the principle of public-utility obligation is accepted—detailed administrative control inevitably follows. That supervision breeds more supervision is a political principle which has the force of natural law.

To be truly free—to perform its public function—the press must be both bold and fearless. It is inconceivable that true freedom of the press could exist if the press were subjected to such controls. It is entirely possible that a

conscientious government would administer such powers with caution. But experience teaches that whenever men have power they will use it—both directly and indirectly.

And any government which can control the press will be irresistibly tempted to do so.*

It is not necessary that such control should be direct. Indeed, control by indirection may be all the more dangerous—because more subtle, more insidious, and therefore more difficult to demonstrate and to resist.

No press can be bold and daring if it is subject to controls which can restrict and hamper it—in a thousand unseen ways—unless it is subservient to the government in power. If the press is subject to pressure or intimidation, the greatest bulwark of popular government is destroyed.

The defendants in this case have watched what has happened in other countries. It is their business to do so. They fear—and rightly fear—anything that might prove to be the first step in the same direction here. To use a homely simile—they fear that if they get even a hand in the wringer, everything else will follow.

Recent history shows only too well the strength of those fundamental forces which tempt governments to the expan-

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* It is not necessary to show that the supervisory power set up by this decree has as yet been actually abused.

> "Proof of an abuse of power has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. * * * It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." (*Thornhill* v. *Alabama*, 310 U. S. 88, at 97.)

The policy of the First Amendment requires that such encroachments be prevented in their very inception. As said in *West Va. Board of Education* v. *Barnette*, 319 U. S. 624, 641:

> "It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."

sion of their power and facilitate their progress in that direction.

The power to control the press possesses an almost irresistible attraction—because it gives the power to control without the use of force—by conditioning the minds of the people.

Freedom of the press has disappeared in nearly all the countries of the world—and always under the plea that such a step is necessary to protect the "public interest."*

Effect of the Judgment Below.

What is the step that has been taken here?

As previously shown, the effect of the judgment below and the public-utility principle on which it is based, means

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* As said by Mr. Chief Justice Stone in his dissenting opinion in *Minersville School District* v. *Gobitis*, 310 U. S. 586, at 604:

> "History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, * * *."

Goebbels, when abolishing freedom of the press in Germany, purported to do so on the ground that he was in reality setting the press free—saying:

> "These shackles are now to be cut. The liberated [sic] press shall serve the state alone, its one and supreme boss! The editors of all Germany are to be elevated to organs of the state, responsible only to the state, and no longer to the advertisers."
>
> (The Rise and Fall of the House of Ullstein, pp. 33-34.)

In Argentina recently an attempt was made to control the freedom of the press under the guise of a requirement for the registration of editors. An editorial in *La Prensa*, resisting this regulation, said:

> "It is no secret for anyone what happened in Italy with the advent of the Fascist regime: the press lost its independence and soon was converted into an instrument of the totalitarian state.
>
> "All at once newspapers were deprived of their special attributes to give them the same aspect with the same creed and tone. It was enough to read one paper to read all, monotonous and submissive. The Italian journalist was converted

that the court has assumed permanent supervision over The Associated Press and, by a parity of reasoning, over other comparable news-gathering agencies. From now on, everything that AP does which in any way affects the question of membership will be subject to recurrent actions—in summary proceedings for contempt—by the Department of Justice and by any paper which regards itself aggrieved. The AP must act at its peril with respect to every applicant for membership in deciding

(1) whether he shall be admitted at all;

(2) the terms of admission—i. e., what terms are "equal";

(3) the terms of continuing to be a member and of enjoying the rights of membership—since logically that follows—so that even after admission the members will have a right to raise the question of "equality" of treatment;

(4) the conditions under which AP can discipline or expel its members.

Thus the members of AP are deprived of the privileges enjoyed by other men—namely,

(1) freedom to choose their own associates;

(2) freedom to enjoy the fruits of their own enterprise.

---

into a functionary and a member of the official party. With his independence died his initiative, will and talent.

* * * * * * *

"Among us, besides having to inscribe in the register to exercise the profession, there is the obligation to renew every two years one's professional card with appeal, if renewal is denied, to a special tribunal, the majority of whom would be government functionaries.

"To ask permission to be free is to confess one's self a slave."

(Editorial from *La Prensa*, Feb. 22, 1944, re-printed in The New York Times, February 23, 1944.)

They are deprived of the right to retain for themselves their own "copy"—they must share it with others before they publish it themselves.

The very industry—and the only one—whose freedom is guaranteed by the Constitution is the only one subjected to this doctrine. Instead of having more freedom, it has less freedom. It is in effect deprived of the right to conduct a *private* cooperative. It is subjected to discriminatory and burdensome controls.

No Clear Necessity—
No Clear and Present Danger.

Many cases have come before this Court in recent years involving the First Amendment. These cases all lay down one fundamental principle—namely, that regulation which limits freedom of speech and of the press cannot be justified except by clear necessity—by clear and present danger. "The substantive evil must be extremely serious, and the degree of imminence extremely high."*

In the very recent case of *West Va. Board of Education* v. *Barnette*, 319 U. S. 624 (1943), this Court reviewed the earlier cases and summed up their doctrine in the following words (p. 639):

> "The right of a State to regulate, for example, a public utility may well include, so far as the due-process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly and of worship, may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."

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* *Bridges* v. *California*, 314 U. S. 252, 263.

What is the "clear and present danger" in the present case? Not monopoly—not domination—not restraint upon access to news events—not inadequacy of competition—not indispensability—not poor service—the court specifically found that

> "AP has for many years furnished to its members news reports which embody the highest standards of accurate, non-partisan and comprehensive news reporting" (F. 26, R. 2609).

The court did not even find a "danger" of any kind whatever. It relied entirely upon a vague and shadowy doctrine of "illumination."

And even this doctrine is not a choice between darkness and light. There was no contention that the facts—the straight news—are not published. There is no contention even that the distinctive AP news—news bearing the "personal impress" of these defendants—will not be published. Indeed the whole point is that they desire to publish it themselves. The question is not whether it shall be published—but merely *who* shall publish it.

The question is not one of clear and present danger. On the contrary—it is the exceedingly controversial question whether more light and better light will be produced by putting the press of the United States in leading strings than by leaving its members to operate under the same driving incentives that society relies upon in the case of other men.

The real danger is the one created by the action of the court itself—namely, the application of such a discriminatory doctrine to the press.

The Public Policy of the First Amendment.

It is not necessary, for the purposes of this case, however, to hold that the judgment below rises to the dignity of actual violation of the First Amendment. The Court is not here faced with the necessity of determining whether Congress has exceeded its constitutional power by a discriminatory statute directed specifically at the press.

It is enough, for the purposes of this case, that the First Amendment is the embodiment of a far more fundamental public policy* which comes directly in conflict with the nebulous and speculative public policy which was the sole basis of the decision of the majority below and in their view justified the conversion of press agencies into public utilities.

The effect of the First Amendment is not confined to the strict letter of its prohibitions. To apply a phrase once used by Mr. Justice Holmes, its underlying principle is so vital and far-reaching that its positive prohibitions are surrounded by a "penumbra."** It is more than a mere command to Congress not to cross certain rigid boundaries which mark the extreme limits to which Congress may go. It is also a declaration of national policy whose connotations embody all the history which lies behind it and which should serve as a guide not only to Congress but to the courts whenever questions of "policy" arise—long before the boundaries themselves are reached.

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* In *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245, this Court said that the First Amendment

> "Expresses one of those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'."

** Mr. Justice Holmes used this vivid and illuminating expression in his dissenting opinion in *Olmstead* v. *U. S.*, 277 U. S. 438, 469, with respect to the Fourth and Fifth Amendments.

The majority below were in error in thinking that the First Amendment—and the policy which it embodies—prohibit only direct restriction upon printing. They seemed to think that there was no room for the application of the policy of the First Amendment because—so they said—the effect of their action was "not to restrict AP members as to what they shall print" (Op., R. 2600).

This language reflects an old and narrow view of freedom of the press even narrower than the views expressed by Blackstone, whose error was later pointed out by Cooley.* Such narrow views have long since been abandoned by this Court.**

Freedom of the press extends not merely to direct restriction of what the press shall print, but to the protection of every essential step in the whole process of collecting, printing and distributing the news.

It prohibits discriminatory taxation. *Grosjean* v. *American Press Co.*, 297 U. S. 233.

It prohibits interference with distribution of news. *Martin* v. *Struthers*, 319 U. S. 141, 143; *Lovell* v. *Griffin*, 303 U. S. 444, 452; *Schneider* v. *State*, 308 U. S. 147, 160; *Thornhill* v. *Alabama*, 310 U. S. 88, 102; *Sun Publishing Co.* v. *Walling*, 140 F. (2) 445, 449-450 (C. C. A. 6th).

It prohibits punishment subsequent to publication. *Near* v. *Minnesota*, 283 U. S. 697, 713-723.

It involves the right to remain silent as well as the right to speak. *West Va. Board of Education* v. *Barnette*, 319 U. S. 624, 634.

* *Cooley Constitutional Limitations*, 8th ed., p. 885.

** See for example the discussion in *Near* v. *Minnesota*, 283 U. S. 697, 714-715, 718-719; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 248, 249.

This Court in *International News Service* v. *Associated Press*, 248 U. S. 215, emphasized that The Associated Press involves "the very facilities and processes of publication" (p. 235).

So, here, it includes the right of these defendants to refuse to disclose to others their own "copy" until they have had an opportunity to publish it themselves.

Freedom of the press is not something which is to be narrowly construed. It is entitled to the broadest possible construction. As this Court said in *Bridges* v. *California*, 314 U. S. 252, 262, the First Amendment is

> "a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

Conclusion.

To repeat—the public policy which underlies the First Amendment is that, so far as humanly possible, the press should be left free. It should not be subjected to discriminatory and hampering legislation. If regulated at all, it should only be for reasons of the gravest necessity.

Such regulations should be imposed—not by courts which are ill-equipped to determine or administer such matters—but only by Congress itself.

Certainly so grave a step as transferring the press from the field of private enterprise to the status of a regulated public utility is the last thing which the courts should do on their own motion—and the last thing that should be done at all so long as any possible alternative exists.

The present case involves no question of monopoly—of domination—of power over others—or inadequacy of competition. The court below acted solely on the basis of a nebulous and exceedingly controversial public policy unsupported by law or by the record in this case—and in

direct conflict with the public policy embodied in the First Amendment.

Its decision should be reversed and the case dismissed.

Respectfully submitted,

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October 23, 1944.

Appendix.

Statutes Involved.

(1) The Sherman Act of July 2, 1890, Sections 1, 2 and 4 (Act of July 2, 1890, C. 647, Secs. 1, 2 and 4, 26 Stat. 209, as amended by 36 Stat. 1167 and 50 Stat. 693, 15 U. S. C. Secs. 1, 2 and 4):

> "[Section 1.] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> "Sec. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> "Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such

violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

(2) The Clayton Act of October 15, 1914, Section 15 (Act of October 15, 1914, c. 323, Sec. 15, 38 Stat. 736, 15 U. S. C. Sec. 25):

"Sec. 15. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof."